85-1561

Supreme Court, U.S.
F I L E D
MAR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ORGANIZED FISHERMEN OF FLORIDA; HERBERT Z. MARVIN; VICTOR H. MARKLEY; and CLYDE R. RAFFIELD, Petitioners,

v.

DONALD P. HODEL, Secretary of the United States Department of the Interior; WILLIAM P. MOTT, Director of the National Park Service; BOB BAKER, Regional Director of the Southeast Regional Office of the National Park Service; JOHN MOREHEAD, Superintendent of Everglades National Park; UNITED STATES DEPARTMENT OF THE INTERIOR; THE NATIONAL PARK SERVICE; EVERGLADES NATIONAL PARK; EVERGLADES PROTECTION ASSOCIATION, INC.; WORLD WIDE SPORTSMEN, INC., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the district courts of the United States have subject matter jurisdiction to entertain, and grant relief upon, a claim of equitable estoppel against the federal government based on allegations of affirmative governmental misconduct, where the government and its agents concededly acted in their official, rather than merely "proprietary," capacities.

2. Whether the Secretary of the Interior may be equitably estopped, by virtue of his predecessors' and their agents' representations and interpretations of pre-existing, vested fishing rights under Florida Statutes, from enforcing against Florida's commercial fishermen otherwise valid new National Park Service regulations permanently

banning commercial fishing in Everglades National Park effective December 31, 1985 (the "Rules").

3. Whether the otherwise valid Rules, as applied, unconstitutionally deny Florida's commercial fishermen due process by arbitrarily and irrationally depriving those fishermen of preexisting vested property rights created by the 1929 Florida-Right-to-Fish Law (which predates the creation of the Park).

PARTIES TO THE PROCEEDINGS

Organized Fishermen of Florida, Inc. ("OFF") is a Florida non-profit corporation whose members are Florida residents who support themselves and their families by fishing. OFF, plaintiff below and petitioner before this Court, is "comprised of approximately 1,500 members, some 100 of whom fish[ed] in Everglades National Park." (App. C, infra, 74a-75a at n.1) (brackets added to reflect permanent ban on commercial fishing in the Park effective December 31, 1985). Herbert Z. Marvin, Victor H. Markley, and Clyde R. Raffield were plaintiffs below and are petitioners before this Court. They are net, hook and line, and stonecrab fishermen, respectively. Each holds commercial fishing permits from the Park (Id.), but

are now prohibited from fishing in the Park (App. K, infra, 131a). Petitioner Marvin is an attorney whose principal income is from his law practice (R. 117-125).

The Secretary of the Interior, the Director of the National Park Service, the Director of the Regional Office of the National Park Service, and the Superintendent of Everglades National Park were defendants below, sued in their official capacities, and are respondents in this Court. The Department of the Interior, the National Park Service, and Everglades National Park were also defendants below and are respondents in this Court.

World Wide Sportsmen, Inc., a Florida corporation, and Everglades Protection Association, Inc., a Florida

non-profit corporation, represent recreational sports fishermen. (App. B, infra, 30a at n. 1). These organizations "were allowed to intervene herein [in the courts below] and have essentially adopt i the [government's] position." (Id.) (brackets added). They are named as respondents herein. Petitioners are not aware of any affiliates of these corporations (other than their members) and no affiliates were disclosed to the courts below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Organized Fishermen of Florida, Herbert Z. Marvin, Victor H. Markley, and Clyde R. Raffield (collectively, "OFF"), petition for a writ of certiorari to review the judgment of the United

States Court of Appeals for the Eleventh Circuit (the "court of appeals" or "11th Circuit") in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1a - 27a) is reported at 775 F.2d 1544. The opinion of the District Court (App. B, infra, 28a-72a) is reported at 590 F.Supp. 805. The prior opinion of the district court (App. C, infra, 73a-97a) is reported at 488 F.Supp. 1351, and was expressly adopted, reaffirmed, and incorporated by reference in the district court's later opinion.

JURISDICTION

The judgment of the court of appeals was entered November 15, 1985

(App. D, infra, 98a-100a), and was issued as the mandate on January 6, 1986 (id.). A timely petition for rehearing was denied on December 23, 1985 (App. E, infra, 101a-102a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves the due process clause of the fifth amendment to the United States Constitution, U.S. Const. Amend. V, which is reproduced at App. F, infra, 103a. This case was deemed by the courts below to involve the property clause of the United States Constitution, U.S. Const., Art. IV, §3, cl. 2, which is reproduced at App. G, infra, 104a. Sections 1 and 4 of the

Everglades National Park Act, 48 Stat. 816, codified at 16 U.S.C. §§410 & 410(c), are reproduced at App. H, infra, 105a-106a. Section 1 of the National Park Service Act, 39 Stat. 535, codified at 16 U.S.C. §1, is reproduced at App. I, infra, 108a-109a.

Section 23, Ch. 13644, Laws of Fla. (1929), provided: "No land owned by the State of Florida shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon, except as provided in this section." Florida's 1929 "Right-to-Fish Law" remains in full force today, as codified, as amended, in Section 370.10(1), Fla. Stat. (1985). The original and current versions of the complete statutory section are reproduced at App. J, infra, 110a-113a.

The challenged National Park Service ("NPS") regulations (the "Rules") were promulgated in 36 C.F.R. §7.45(e)-(h) (1980), as amended in 45 Fed. Reg. 10,350 (1980), codified, as amended, in 35 C.F.R. 7.45(e)-(h) (1985), and are reproduced at App. K, infra, 114a-131a. This case also involves 38 Fed. Reg. 16,778 - 16,780 (1973), which is reproduced at App. L, infra, 132a - 138a.

STATEMENT OF THE CASE

1. "Before the [P]ark was created, the [Park] Service agreed that both commercial and sport fishing would continue on what can be termed as a 'sustained yield' basis in accordance with, or in close conformity to, the laws of the State of Florida." Thus wrote the NPS Director in 1959 to then

U.S. Senator (former Florida Governor) Spessard L. Holland. (AR 10 at 29). The NPS Director concluded, "You may be assured that any regulations added to the present program will be made in compliance with the commitments made in the past by the Park Service and will be based on scientific evidence produced by proper research." (Id.). Prior to this action, consistent with the 1929 Florida Right-to-Fish Law, NPS adhered to these commitments and routinely represented NPS had done so and would continue to do so. (The Secretary disputes this.)[1/]

2. These NPS promises, representations, and commitments and

1/ The district court determined the facts on the parties' cross-motions for summary judgment, adopting that court's prior memorandum opinion (R. 242-50, incorporated, R. 870-93). See generally App. B, infra, 32a, 44a, ¶ 23 & n.3, 45a.

repeated subsequent NPS reaffirmations thereof (1936-1978 inclusive) appear in the public record correspondence, telegrams, and official statements of several generations of NPS Directors and Florida officials.[2/] The NPS commitments did not, however, appear in Florida's 1944 deed of conveyance of Florida lands for the Park to the United States, presumably because the 1929 Florida Right-to-Fish Law and the written NPS assurances were

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2/ Principally in the National Archives and Florida Archives. For a year-by-year account, see, for example, in order, SJ App. 3, excerpted in AR 10 at 26; AR 1 at 5; AR 2 at 1; SJ App. 4; AR 10 at 27; AR at 26; SJ App. 5; AR 2 at 2-3; Jnl. of the Fla. H.R. 106 (Apr. 17, 1947) (SJ App. 1-2); SJ App. 13-15; AR at 15. See generally, e.g., C. Tebeau, They Lived in the Park: The Story of Man in the Everglades National Park 125-42 (1963), cited throughout AR 10; Everglades National Park, Fla.: Hearings on S. 1790 Before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 85th Cong. 1st Sess. at 18-20 & Ex. 1-22 (June 11-12, 1957) (testimony of Sen. Holland).

deemed sufficient guarantees by the federal officials (who made them) and the Florida Governor and Cabinet, the Florida Legislature, and Florida commercial fishermen (who and which specifically relied upon them). Cf. note 1 supra. In any case, as the first Park Superintendent recalled 30 years ago, "Florida Bay with all its present and potential park values might not ever have been a part of Everglades National Park if we had not arrived at an understanding with the commercial fishermen."3/ There is substantial additional

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3/ Letter of Daniel B. Beard, Jr., Superintendent, Everglades National Park [the Park's first superintendent and a pivotal figure in the Park's creation while with the U.S. Fish and Wildlife Service ("FWS")], to U.S. Sen. Holland (Jan. 11, 1956) (AR at 15). Senator Holland concurred and had previously so stated. See, e.g., SJ App. 13-15 (Jan. 7, 1956) ("It is simply a fact that the agreement for the continuance of commercial fishing in these salt

(footnote continued)

historical evidence in the record which suggests that, but for these NPS commitments, Florida would never have conveyed the Park lands and the Florida Legislature in 1947 would never have appropriated the funds to make the Park possible.[4/]

3. In 1973 NPS rejected the suggestion of sport fishermen that commercial fishermen be prohibited in the Park, declaring in the Federal

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3/ (continued)
waters of Monroe County that were included in the Park was a part of the transaction by which the Park was created and under which it was accepted by the Federal Government"). Holland's knowledge was first hand, for as Florida's Governor he had personally conducted the negotiations with the NPS and FWS Directors, where the prior NPS representations were reaffirmed. See Minutes of [U.S./Florida] Conference re Everglades National Park (Dec. 13, 1944), excerpted in AR 10 at 27. Governor Holland signed the deed on December 28, 1944. The Secretary accepted the deed on March 14, 1947. The deed was recorded on April 11, 1947 in Dade County, Florida and on June 21, 1947 in Monroe County, Florida.

4/ See note 2 supra. (The Secretary disputes this causal linkage.)

Register that such prohibition would violate the "several commitments to local interests" and "promises" the "Federal Government" and NPS had made "[a]s early as 1936" to Florida and its commercial fishermen. 38 Fed. Reg. 16,778, 16,780 (1973) (SJ App. 16), App. L, infra, 135a. "This constitutes the basis of fisheries management in Everglades National Park." Id.; accord, id. 137a. In 1978 the NPS Regional Director wrote to Florida Congressman Dante Fascell, reaffirming that NPS had "made commitments to the State of Florida and Florida fishermen to continue commercial fishing there. Those commitments, which predate the establishment of the Park, were reconfirmed to Senator Spessard L. Holland in 1959." (AR 5 at 6). Those 1936 commitments had been previously

reconfirmed by NPS Directors in 1937, 1939, 1944, 1947, and 1951.[5/]

4. In 1978 the Park Superintendent, as a result of complaints from recreational fishermen and commercial fishing guides about the quality of fishing in the Park, imposed a moratorium on the issuance of new permits to all commercial fishermen other than guides and requested the Park Biologist to prepare an assessment of fishery management options for the Park (the "Assessment") (AR 10). Park officials undertook no scientific studies to determine if there was any basis for the complaints of the sport fishermen, but instead chose to rely on data which had

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5/ See note 2 supra. (The Secretary disputes this, and believes all these representations were mere expressions of NPS policy, which he is free to abandon.)

been collected from recreational and commercial fishermen at various times and locations since 1958. (AR 5).[6/] Recreational fishermen, who believed commercial fishermen were causing declines in the Park's fisheries, were instrumental in initiating the rulemaking process which culminated in the prohibition of commercial fishing (AR 5). NPS knew there was no evidence that commercial fishing caused such declines and that

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6/ The Assessment showed that during the period immediately preceding its preparation, the Park experienced an increased demand for recreational fishing opportunities (AR 10 at 2). There was a dramatic increase, from 7,620 in 1976 to 59,440 in 1977, in the number of man hours of professional guide fishing (AR 10 at 34). This was accompanied by a sharp increase in the number of guide clients and recreational fishermen who caught nothing (AR 10 at 34, ¶ 60). There was no evidence that any decline was attributable to commercial fishing. SJ App. 148-49 (Park Biologist 1978 study).

all the evidence was to the contrary.[7/] Nonetheless, NPS proposed a ban on commercial fishing as a rulemaking alternative "as a definitive solution to the competition between commercial and recreational fishing interests in the Park" (AR 61). On February 15, 1980, NPS adopted the Rules. These regulations banned commercial fishing in the Park by (i) imposing bag limits of ten fish per species and not more than a total of twenty fish of all species, (ii) establishing sanctuaries for endangered

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7/ E.g., AR 5 at 12; AR 48 at 6; AR 48 at 4 (deposition record citations omitted). Similarly, Park officials also admitted they knew there was no evidence that banning commercial fishing would improve recreational catch rates and they so informed sport fishermen and guides. E.g., SJ App. 117; AR 8 at 53 (deposition record citations omitted). The Secretary disputes the relevancy of the proposition in the text, and apparently also disputes the accuracy of the "no evidence" statement.

species in areas which had traditionally been used for mullet fishing, and (iii) prohibiting all commercial fishing in Park waters as of December 31, 1985. (App. K, infra, 123a, 127a, 131a).

5. OFF, by action filed March 28, 1980, sought declaratory and injunctive relief prohibiting the United States from enforcing the Rules against OFF, principally alleging claims of estoppel and deprivation of substantive due process, as well as claims under the Federal Administrative Procedures Act ("APA"), 5 U.S.C. § 551 et seq. The district court's jurisdiction was invoked in relevant part under 28 U.S.C. § 1331 on the basis that OFF's estoppel and due process claims presented a federal question. OFF contended that the Rules were contrary to the NPS commitments

(whether characterized as a contract or as representations) and were not based on scientific evidence produced by proper research, contrary to those NPS commitments. The Secretary asserted numerous defenses and contended the past NPS representations were mere policy statements subject to change at the Secretary's discretion.

6. The district court found "plaintiffs [OFF] have adequately established the first requirement, economic injury in fact," (App. B, infra, 66a), but upheld the Rules, incorporating that court's prior (1980) decision denying OFF's motion for preliminary injunction. (Id., 32a, 45a; see App. C, infra, 97a). The district court felt constrained by what it deemed "controlling precedent in this [the then Fifth] Circuit," United

States v. Florida, 482 F.2d 205 (5th Cir. 1973), to hold in 1980 and again in 1984 that the United States is not subject to estoppel. (App. C, infra, 92a, adopted and reaffirmed App. B, infra, 32a, 45a) The district court apparently believed it lacked subject matter jurisdiction with respect to this claim and OFF's companion contract and due process claims because the district court concluded in 1984, "Here, the object of the instant suit, no matter how it is expressed, seeks quite clearly to compel the Defendants in their official capacity to specifically perform a contract." (App. B, infra, 64a). On this basis, the district court expressly held "this [district] Court is without jurisdiction to grant specific performance of a contract, if any, between the

United States and the State of Florida, absent waiver of sovereign immunity." (App. B, 63a.) Consequently, the district court adopted and reaffirmed its prior decision. (App. B, infra, 32a, 45a.)

7. OFF appealed. OFF argued that the 11th Circuit had repeatedly reserved the question whether estoppel against the government was a viable claim and hence that court should finally decide the question. OFF observed, without contradiction by the Secretary, that this was not a specific performance case as there was no claim or demand by OFF (as third party beneficiaries of the alleged contract) that the United States return the Park lands to Florida to remedy the alleged breach. The 11th Circuit, following oral argument and court-solicited supplemental briefing,

nominally affirmed the judgment of the district court in all respects (while ignoring the district court's rationale in all material respects). Thus, contrary to the district court, the 11th Circuit expressly assumed, but expressly declined to decide, that estoppel against the government is a viable claim. (App. A, infra, 21a) On the basis of this assumption, the 11th Circuit concluded, with respect to the estoppel and due process claims, "These statements upon which OFF relies simply cannot be fairly read as guarantees that the NPS would never prohibit commercial fishing in the Park." (App. A, infra, 15a).

8. Construing the 1929 Florida Right-to-Fish Law in this case of first impression, the 11th Circuit concluded,

> The United States, as Florida's successor in ownership of the Park land, would have the same power to regulate fishing in order to conserve Park resources. Therefore, even assuming that the Florida statute was subsumed in the conveyance, the Right-to-Fish Law does not support OFF's contention that it has a vested property right in commercial fishing in the Park. Since OFF has no property right in commercial fishing in the Park, either by virtue of the Florida statute or by virtue of a contract between Florida and the United States, OFF's substantive due process claim fails.

(App. A, infra, 19a-20a).

Despite this conclusion, the 11th Circuit expressly disclaimed reaching the merits of OFF's due process claim. (Id., infra, 10a-11a at n. 1). Again, the rationale of the court of appeals was completely different from that of the district court, which had determined OFF's claims were foreclosed by the

property clause of the United States Constitution. U.S. Const, art. IV, § 3, cl. 2. (App. C, infra, 88a-89a; see App. G, infra, 104a). Finally, the 11th Circuit concluded under the APA that "[t]he facts in the record sufficiently support the Secretary's decision" and hence the Rules were not arbitrary and capricious. (App. A, infra, 27a). The court of appeals stated, "The task of weighing the competing uses of federal property has been delegated by Congress to the Secretary of the Interior. Consequently, the Secretary has broad discretion in determining how best to protect public land resources." (Id., 26a) (case citations omitted). Consequently to date the courts below have never decided whether Florida's commercial fishermen had preexisting vested

fishing rights under Florida law prior to the creation of the Park.

9. OFF filed a petition for rehearing (by the panel) suggesting that the 11th Circuit had misapprehended the applicable law governing the interpretation and effect of Florida's 1929 Right-to-Fish Law and had overlooked or misapprehended the precise contract and estoppel claims which OFF had actually argued on appeal. OFF's rehearing petition stated the 11th Circuit's opinion (i) first said OFF made an argument it never made, (ii) then countered that argument. OFF never argued that under no circumstances could commercial fishing in the Park be prohibited. Rather, OFF has always contended that commercial fishermen had an absolute right to fish in the Park in

accordance with Florida law, "unless the destruction of some variety of fish is definitely threatened" (much later reformulated by NPS to mean "that the marine resources will be preserved and harvested on a sustained yield basis").[8/] The 11th Circuit denied that petition per curiam and thereby declined to accept OFF's suggestion that the 11th Circuit should certify the Florida statutory interpretation question to the Florida Supreme Court for dispositive interpretation.

10. On March 18, 1986 OFF filed in the 11th Circuit pursuant to that court's local rules a motion to

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8/ OFF's petition at 5, filed December 3, 1985. The identical argument was made in OFF's initial brief at 33-34 (quoting the same 1936 letter excerpted in the decision below at App. A, infra, 11a-12a).

recall the mandate to prevent injustice on the grounds that the United States' lawyers had improperly failed to disclose to that court and OFF's counsel (during the pendency of the appeal and OFF's petition for rehearing) the Solicitor General's intervening contrary representations to this Court regarding the actual state of the current controlling law in the 11th Circuit governing estoppel against the government. The motion was based on the Solicitor General's own interpretation of the 11th Circuit's decision in "Payne III."[9/] As of this writing, OFF's motion to recall mandate remains pending in the court of appeals.

9/ See, e.g., [United States'] Petition for a Writ of Certiorari, Block v. Payne, 53 U.S.L.W. 3896 (U.S. June 14, 1985) (No. 84-1948), cert. granted, ___ U.S. ___, 106 S.Ct. 57 (1985).

(footnote continued)

REASONS FOR GRANTING THE WRIT

The decision below is the latest in a series of decisions by the 11th Circuit in which that court has expressly reserved the question whether estoppel will lie against the government.[10/] In several of these cases,

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9/ (continued)

Also see Solicitor General's reply brief filed Sept. 4, 1985 and his brief on the merits filed Dec. 20, 1985 in that case. See generally, Payne v. Block, 714 F.2d 1510 (11th Cir. 1983), as modified, 721 F.2d 741 (1983), vacated and remanded, ____ U.S. ____, 105 S.Ct. 65 (1984), prior decision reinstated on remand, Payne v. Block, 751 F.2d 1191 (11th Cir. 1985) ("Payne III"), cert. granted, ___ U.S. ___, 106 S.Ct. 57 (1985).

10/ See, e.g., Buccaneer Point Estates, Inc. v. United States, 729 F.2d 1297, 1299 n.2 (11th Cir. 1984); United States v. Context-Marks Corp., 729 F.2d 1294, 1297 n.4 (11th Cir. 1984); FDIC v. Harrison, 735 F.2d 408, 410 (11th Cir. 1984) reh'g denied en banc, 768 F.2d 1353 (1985); George v. Railroad Retirement Board, 738 F.2d 1233, 1237 (11th Cir. 1984).

(footnote continued)

including this case, the 11th Circuit appears to have applied the estoppel

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10/ (continued)

In some of these cases, the court of appeals reserved the substantive question (i.e., whether estoppel is a viable claim), and inferentially the necessary jurisdictional assumptions, in the course of applying the test de facto and explaining why the private party failed to meet the estoppel test which the court of appeals applied. E.g., George, supra. Conversely, the Solicitor General reads the court of appeals' decision in Payne III, supra, as accepting and applying the estoppel doctrine against the government, despite the 11th Circuit's express disclaimer in that case. See authorities cited in note 9 supra.

In Deltona v. Alexander, 682 F.2d 888, 889 (11th Cir. 1982), the court of appeals stated this Court's precedents indicated "an open issue exists whether estoppel lies against the government if a party proves 'affirmative misconduct' on the part of the government agent." (citations omitted). At that time the 11th Circuit noted, "The Ninth Circuit has already adopted the 'affirmative misconduct' exception, but neither the former Fifth nor Eleventh Circuit has addressed the issue." Deltona, 682 F.2d at 891 n.4. Since Deltona it appears (at least) the First, Second, Third, Sixth, Seventh, Eighth, Tenth, and Federal Circuits have also adopted the doctrine. See,

(footnote continued)

doctrine de facto to decide the merits of estoppel claims (while disclaiming to do so) -- without ever expressly considering or deciding whether the district courts had subject matter jurisdiction to entertain the claim and without offering any meaningful guidance to the district courts or private litigants or the United States. This Court should review the decision below to give much

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10/ (continued)

e.g., Akbarin v. INS, 669 F.2d 839 (1st Cir. 1982) (immigration); Chu v. Schweiker, 690 F.2d 330 (2d Cir. 1982) (hospital administration); Yang v. INS, 574 F.2d 171 (3d Cir. 1978) (immigration); Housing Authority of Elliott County v. Bergland, 749 F.2d 1184 (6th Cir. 1984) (public housing); Portmann v. United States, 674 F.2d 1155 (7th Cir. 1982) (Postal Service); Story v. Marsh, 732 F.2d 1375 (8th Cir. 1984) (eminent domain); Lavin v. Marsh, 644 F.2d 1378 (9th Cir. 1981) (Army Pension eligibility); Lurch v. United States, 719 F.2d 333 (10th Cir. 1983), cert. denied, 466 U.S. 927 (1984) (Veterans Administration medical malpractice); City of Alexandria v. United States, 737 F.2d 1022, 1028 (Fed. Cir. 1984).

needed guidance to the lower federal courts regarding their power and duty to entertain and decide claims of estoppel by affirmative governmental misconduct in accordance with this Court's decision in Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 (1984).

1. Here, the 11th Circuit expressly assumed, but expressly declined to decide, that estoppel against the federal government is a viable claim. Cf. Payne III, supra. That assumption necessarily required the 11th Circuit to assume that the district court had subject matter jurisdiction to decide the claim. Instead of vacating and remanding the case to the district court for proper threshold determinations on the basis of that jurisdictional assump-

tion, the 11th Circuit simply concluded, "OFF's argument fails because the representations made by NPS officials were simply not promises of the type upon which all estoppel claims must be based." (App. A, infra, 21a-22a). Although the 11th Circuit's estoppel analysis purported to rely solely on Heckler, the court of appeals did not explain what type of promise or misrepresentation that court believed would be sufficient to state that claim under Heckler or why the promises and representations here were insufficient under this Court's decision in that case. OFF believes the decision below conflicts with this Court's decision and analysis in Heckler in many respects, as well as the 11th Circuit's own prior interpretation of Heckler in Payne III, and numerous

decisions of other courts of appeals adhering to and meaningfully applying the elements set forth in Heckler.[11/]

2. The decision below also paradoxically conflicts with the United States' own reading of the 11th Circuit's position in Payne III (i.e., the state of the law of governmental estoppel in the 11th Circuit) in its petition for certiorari and briefs in this Court in that case.[12/] This Court, having granted certiorari in Payne III (where, follow-

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11/ In addition to the cases cited in note 10, supra, see, e.g., United States v. Huebner, 752 F.2d 1235, 1244 & n.11 (7th Cir. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 62 (1985). OFF brought all these cases to the attention of the court of appeals. Huebner and City of Alexandria, supra, analyze the criteria set forth in Heckler and then apply that criteria to the facts in those cases. Cf. Payne III, supra. The estoppel analysis in those cases is ignored in, and conflicts with, the decision below.

12/ See note 9 supra and accompanying text.

ing remand from this Court, the 11th Court expressly held Heckler was inapposite), should now grant certiorari in this case, which was decided after Payne III. Unlike that case, in this case the parties and the 11th Circuit all agree that Heckler is apposite and controls. This Court in Heckler reserved the substantial federal question whether estoppel by affirmative governmental misconduct is a viable claim. Surely this Court's reservation of the question was not intended to foreclose the lower federal courts from deciding the question where squarely and unavoidably presented.[13/]

13/ See, e.g., United States v. Locke, ___ U.S. ___, ___, 105 S.Ct. 1785, 1790 n.7 (1985); accord, id. at ___ U.S. ___, 105 S.Ct. at 1801-02 (O'Connor, J., concurring); Tosco Corporation v. Hodel, 611 F.Supp. 1130, 1198-1209 (D.Colo. 1985) (so holding); semble, see also Walters v. Home Savings and Loan

(footnote continued)

3. The 11th Circuit further concluded, "Assuming OFF relied on the NPS representations, that reliance was unreasonable." (App. A, infra, 22a). Yet Heckler itself nowhere suggested that a representation must rise to the level of a promise to support a finding of estoppel or the predicate elements of

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13/ (continued)

Association, ___ U.S. ___, 104 S.Ct. 2673 (1984) (mem), on remand, 742 F.2d 585, 586 (10th Cir. 1984) ("It would be helpful if the Court would clarify the point."). The decision below also disclaims reaching the merits of OFF's constitutional claim (App. A, infra, 10a-11a at n.1), but the 11th Circuit's conclusion that "OFF has no property right in commercial fishing in the Park" (id.) is itself a constitutional holding directly under the fifth amendment of the United States Constitution under this Court's decisions, and the court of appeals' own decisions. See e.g., Federal Deposit Insurance Corp. v. Morrison, 747 F.2d 610, 614 (11th Cir. 1984), reh'g denied en banc, 763 F.2d 419 (11th Cir. 1985). See generally, National Wildlife Federation v. Marsh, 747 F.2d 616, 620 (11th Cir. 1984) ("A new law will not be applied if it adversely affects a party's vested rights.").

reasonable and detrimental reliance.[14/] The decision below creates an unrealistic standard of reasonable detrimental reliance and conflicts with this Court's teaching: "When a private party is deprived of something to which it was entitled of right, it has surely suffered a detrimental change in position." Heckler, 467 U.S. at 53. The decision below evades these questions (deprivation, entitlement of right, and detrimental change of position), despite extensive briefing by the parties.

4. To reach these results (which, OFF believes, find no support in

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14/ Even assuming any rational equitable or promissory estoppel doctrine would allow the Secretary to dispute the historical or factual accuracy of prior NPS Directors' statements that the representations were commitments to be relied upon and which had been relied upon.

traditional estoppel doctrine as explained in this Court's decisions), the 11th Circuit simply ascribed to OFF an absolutist position (commercial fishing can never, under any circumstances, be prohibited in the Park), which OFF never argued. Relying on Heckler, the 11th Circuit held, "Since OFF fails to establish the traditional requirements for estoppel, this claim will not prohibit the enforcement of the instant regulations." (App. A, infra, 22a-23a.) But the decision below misstates even the traditional elements for an estoppel claim (Id. 21a), contrary to this Court's restatement of them in Heckler. Moreover, the decision below simply ignores Heckler's larger teaching regarding the practical, legal, and moral significance for governmental estoppel purposes of representa-

tions of ranking federal officials made in writing. In this respect too, the decision below conflicts with Heckler and its progeny in other courts of appeals. See, e.g., Huebner, supra; City of Alexandria, supra. Only by fundamentally mischaracterizing OFF's claim, historical evidence, and argument was the 11th Circuit able to evade Heckler's criteria for governmental estoppel.

5. This is a case where the statements of the federal officials alleged to give rise to estoppel expressly and uniformly refer to state law as the operative source and criteria for future federal regulation.[15/] This circumstance

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15/ Thus the decision below only "assumes" the 1929 Right-to-Fish Law was "subsumed" in

(footnote continued)

alone warrants careful consideration of this petition, for this Court apparently has yet to address governmental estoppel in this context. The 11th Circuit concluded that the United States is Florida's successor in interest under the 1929 Florida Right-to-Fish Law and that "[o]nly regulations inconsistent with the conservation function could potentially run afoul of the Florida statute." (App. A, infra, 19a). These wholly unforseeable holdings necessarily presuppose that is how Florida courts

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15/ (continued)

the conveyance (App. A, infra, 19a), in disregard of this Court's decisions which hold that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." E.g., United States Trust Co. v. New Jersey, 431 U.S. 1, 19 n. 17 (1977) (citing prior decisions of this Court), reh'g denied, 431 U.S. 975 (1977).

would interpret that crucial Florida statute -- notwithstanding the statute facially provides only the Florida Legislature the right to make exceptions to the people's "absolute right" to fish under that statute.[16/] The 11th Circuit simply ignored this Court's decisions

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16/ The 11th Circuit's interpretation confounds all familiar principles of statutory construction, and, if allowed to stand, raises very serious questions under the tenth amendment of the United States Constitution and the basic tenets of federalism.

The decision below omitted to state that the Florida courts have never construed the 1929 Florida Right-to-Fish Law. Instead, the 11th Circuit "note[d] that the State of Florida . . . has been conspicuously silent," (App. A, infra, 20a n.3), which is constitutionally irrelevant insofar as the State failed to appear amicus and is also inaccurate in fact insofar as it implies the State concurred in the Rules or the 11th Circuit's interpretation of the 1929 Florida Right-to-Fish Law. Most of the historical documents relied upon by OFF were simply omitted in the 11th Circuit's analysis. See generally C.A. Miller, The Supreme Court and the Uses of History at 196 (1969 pbk. rpt. 1972).

defining state law questions of statutory interpretation and this Court's long-standing decisions regarding the prudential criteria for Pullman abstention[17/] in such circumstances.[18/]

17/ Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941), interpreted in Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984). For a recent application of Pullman abstention, see Onondaga Landfill Systems Inc. v. Williams, 624 F.Supp. 25 (N.D.N.Y. 1985) (summarizing this Court's decisions).

18/ For this Court's view of the importance of, and reasons for, Pullman abstention where state fishing laws have not been construed by the state courts, see Reetz v. Bozanich, 397 U.S. 82 (1970) (commercial fishing rights under Alaska law).

In that case, this Court vacated and remanded with directions to abstain, because "We are advised that the [right-to-fish] provisions of the Alaska Constitution at issue have never been interpreted by an Alaska court." Reetz, 397 U.S. at 86 (brackets added). Compare 1929 Florida Right-to-Fish Law with Alaska Const., art. VIII, § 3 ("Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."), quoted in Reetz at 84.

6. If indeed Florida's conveyance to the United States in reliance on NPS' representations caused Florida's commercial fishermen to lose their vested fishing rights under Florida law (which OFF does not concede, but which is the net effect of the decisions below), then this Court should grant certiorari and, upon review, conclude that such NPS commitments were indeed empty promises, worthless because backed by no federal statutory guarantee or deed restriction. If so, such representations should never have been made, and, consequently these reckless commitments constituted "affirmative misconduct" on the part of the United States and its agents, which misconduct operates to estop the United States from enforcing the NPS Rules against Florida's commercial fishermen.

7. If that is not the case, then the real question here is whether, as a matter of estoppel or due process, the Secretary must honorably keep the honestly made commitments of his predecessors' agents.19/

CONCLUSION

This petition for certiorari should be granted and, upon review, if this Court decides estoppel against the federal government is a viable claim,

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19/ The decision below simply ignores this Court's -- and the 11th Circuit's own -- recognition of the "interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government." Heckler, 467 U.S. at 57, quoted with approval in, e.g., FDIC v. Harrison, 735 F.2d at 408, 410 n.3 (11th Cir. 1984). See, e.g., Tosco Corporation, supra, 611 F.Supp. at 1204 (holding the Secretary was estopped) ("When the department continued to act in accordance with its interpretation for the next 28 years, oil shale claimants were entitled to rely on the department and cannot now be charged with the knowledge that the interpretation was erroneous.")

the decisions of the court of appeals and the district court should be reversed. In the alternative, the petition should be granted and, upon review, the decisions of the court of appeals and the district court should be vacated and remanded for further proceedings with instructions to the courts below to certify the state law question regarding the interpretation of the 1929 Florida Right-to-Fish Law to the Florida Supreme Court before reconsidering the merits of the estoppel and due process claims.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5722

ORGANIZED FISHERMEN OF FLORIDA, Herbert Z. Marvin, Victor H. Markley, and Clyde R. Raffield,

Plaintiffs-Appellants,

v.

Donald P. HODEL, Secretary, United States Department of the Interior, Russell Dickensen, Director of the National Park Service, Bob Baker, Regional Director of the Southeast Regional Office of the National Park Service, and John Morehead, Superintendent of Everglades National Park, U.S. Department of the Interior, the National Park Service, and Everglades National Park,

Defendants-Appellees,

Everglades Protection Association, Inc., & World Wide Sportsmen, Inc.,

Intervenors.

Appeal from the United States District Court for the Southern District of Florida

November 15, 1985

BEFORE HILL, ANDERSON AND GARZA,* Circuit Judges.

R. LANIER ANDERSON, III, Circuit Judge:

Organized Fishermen of Florida and three individuals (collectively referred to as "OFF") filed a complaint in the United States District Court for the Southern District of Florida against the Secretary of the Interior and others ("the Secretary" or "the National Park Service" or "NPS") seeking declaratory and injunctive relief from regulations issued by the Department of the Interior in final form on February 15, 1980 (the "Rules"). 36 C.F.R. § 7.45(e)-(h) (1985). The Rules imposed bag limits on

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*/ Honorable Reynaldo G. Garza, U.S. Circuit Court Judge for the Fifth Circuit, sitting by designation.

fish caught in the Everglades National Park (the "Park"), established sanctuaries in the Park for endangered species and prohibited all commercial fishing in the Park as of December 31, 1985. OFF's motion for a preliminary injunction to prohibit the enforcement of the Rules was denied. OFF v. Andrus, 488 F.Supp. 1351 (S.D.Fla. 1980). OFF and NPS then filed cross-motions for summary judgment. NPS' motion for summary judgment was granted. OFF v. Watt, 590 F.Supp. 805 (S.D.Fla. 1984). OFF appeals from this decision. We affirm.

I. - BACKGROUND

The background of this case is as follows: In 1934, Congress enacted the law which authorized establishment of the Everglades National Park at such

time that title to sufficient lands in the region of the Everglades had been vested in the United States. 16 U.S.C. § 410 (1982). That statute mandated that the proposed park be administered as a wilderness, and that the unique flora and fauna and essential primitive natural conditions then prevailing in the area be preserved intact. 16 U.S.C. § 410c (1982). The legislation made no reference to commercial fishing.

During the time the Florida legislature considered donating state lands and funds for the park, several state officials sought clarification of the views and policies of the NPS regarding commercial fishing. The gist of the communications from NPS officials to representatives of the State of Florida was that commercial fishing would be

subject to reasonable regulations necessary to perpetuate fish resources but that the NPS did not contemplate prohibiting commercial fishing in the proposed park. See Section II.A., infra, for a full discussion of NPS' representations regarding commercial fishing in the Park.

In 1944, Florida conveyed the land for the Park to the United States. The deed contained no reservation of commercial fishing rights. Following the formal establishment of the Park in 1947, Congress added a section to the authorizing statute. The new section of the Act reserved oil, gas and mineral rights but made no mention of commercial fishing in the Park. 16 U.S.C. § 410e (1982). Also, following the Park's establishment, the NPS promulgated rules

regulating commercial fishing in the Park. Administrative Record part 10, at 27-29.

Some years later, the Park Superintendent began to receive complaints about the "diminishing sport fish population." The NPS also received requests that it establish bag limits on red fish and trout in the Park. The number of complaints peaked in 1978. In response to these complaints and a petition bearing the names of almost 5,000 people, the NPS undertook a study of the matter. The study utilized computerized data acquired during the preceding years from commercial and sport fishermen. A private consulting firm was hired which assembled socio-economic data. Fish populations were studied, catch rates were projected, and

socioeconomic effects were reviewed. Public workshops and public hearings were held at which the views of the public, especially those of park users, were aired. Particularly, the opinions of commercial fishermen, sport and recreational fishermen, professional guides, environmentalists and conservationists were heard. Reports on endangered species were also received.

While there seemed to be general agreement that the fish resource needed protection, there was substantial disagreement on the extent of the problem and its cause. Blame for the problem was variously attributed to commercial fishermen, the quality of the water, the development of southern Florida and past NPS management decisions. Some groups advocated an immedi-

ate ban on commercial fishing and stricter limits on the recreational catch while some perceived no problem at all and believed, therefore, that restrictions on fishing would be meaningless, if not counterproductive.

All of the aforementioned information was available to the Secretary of the Interior for consideration. On September 14, 1979, the proposed rules were published in the Federal Register. 44 Fed.Reg. 53541 (1979). The Rules regulated fishing in the Park by (1) imposing bag limits of ten fish per species and not more than a total of twenty fish of all species, (2) establishing sanctuaries for endangered species and (3) prohibiting all commercial fishing in the Park, effective December 31, 1985 (over six years after

the original proposal). Following an analysis of public comments and an internal review by the NPS, the final regulations were approved and published in the Federal Register on February 15, 1980. 45 Fed. Reg. 10350 (1980).

II. - DISCUSSION

On appeal, OFF presents three major arguments. First, OFF argues that it is a third-party beneficiary to a contract between Florida and the United States. The Rules, OFF asserts, abridge OFF's vested property right in commercial fishing that OFF holds by virtue of its alleged third-party beneficiary status, and by virtue of a Florida law that allegedly guarantees OFF the right to fish in the Park. Second, OFF claims that even if no enforceable contract

exists, the NPS should be estopped from enforcing the Rules because it promised never to prohibit commercial fishing in the Park. Finally, OFF argues that the Rules are arbitrary and capricious and, therefore, invalid under the Administrative Procedure Act.

A. Third-Party Beneficiary Status

OFF argues that it has a vested property right in commercial fishing in the Park as a third-party beneficiary of an alleged contract between the state of Florida and the United States government. Enforcement of the Rules, OFF claims, abridges its property right in violation of Fifth Amendment substantive due process.[1/]

1/ In light of our conclusion that OFF has no property right in commercial fishing in the

(footnote continued)

OFF asserts that the United States agreed never to prohibit commercial fishing in the Park in exchange for the conveyance of Florida land for the Park. This agreement is allegedly evidenced by and based upon NPS' representations concerning commercial fishing in the Park. One such representation was in a 1936 letter from the then director of the NPS, Arno Cammerer, to Florida Congressman J. Hardin Peterson. That letter stated in part:

> Whenever the question has been asked, these fishermen [in national parks] have been informed that the National

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1/ (footnote continued)

Park, and although we entertain considerable doubt about the merits of the claim, we need not address the merits of OFF's argument that the Rules constitute a deprivation of OFF's property rights without due process. Neither need we decide whether NPS officials have the authority to abdicate the Service's congressionally prescribed conservation function.

> Park Service does not contemplate any injustice to them, nor any curtailment of their legal operations. With [this] as a background, commercial fishermen using the waters surrounding the Everglades may expect equally fair treatment. As a conservation bureau, the National Park Service would naturally have to keep an eye on commercial fishery operations and see to it that the supply is conserved. Usually the same laws that are in force outside a national park apply also within, and it would be reasonable to expect that in the administration of this park care would be taken to provide restrictions similar to those in nearby waters unless the destruction of some variety of fish is definitely threatened. In other words, since the Everglades park area and especially its coastal water area is so great, I have seen no reason why off-coast commericial fishing may not be continued in the future as it has in the past without injury to park values.

OFF also quoted in its appellate brief a letter of A.E. Damaray, acting director of the NPS in 1939, as

stating, "The National Park Service has stated from time to time that commercial fishing will not be prohibited in the proposed park. . . . Please assure the members of the Chamber of Commerce that the National Park Service will not make rules and regulations that will jeopardize the fishing industry of the Florida Keys." Brief of Appellant at 9 n. 12. OFF neglected to point out, however, that the letter also includes a sentence stating: "Just how much [commercial fishing] can be permitted and under what conditions is a question that should be ironed out this winter, at least in its broader aspects."

As can be readily seen from these examples, the NPS never purported to abdicate its right and duty to exer-

cise its conservation function.[2/] Although OFF's contract and estoppel claims must necessarily rest on NPS representations made prior to Florida's alleged act of reliance (the 1944 conveyance of land for the Park), subsequent communications reaffirm our reading of NPS' intent in the earlier letters and telegrams. For example, a 1947 telegram from the Chicago Director of the NPS stated:

> At request Regional Director Allen, National Park Service, you are advised long-time National Park Service policy which contemplates fishing in national parks and monuments shall be done in conformity with State laws and regula-

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2/ Other representations upon which OFF relies are similarly equivocal. See, e.g., Administrative Record part 1, at 5; Administrative Record part 2, at 1-3, 7, 14-15. Our analysis of these representations, consistent with the examples discussed above, is that they are not promises that commercial fishing would never be prohibited.

> tions subject to reasonable regulations necessary to protect and perpetuate fish resources will apply to Everglades National Park. In keeping with commitment of former Director Cammerer in letter April 28, 1937, to Chester Thompson, Key West, commercial fishing will not be prohibited in the proposed Park.

(Emphasis added). In a 1956 letter, Park Superintendent Beard quoted a part of the 1936 letter from Director Cammerer and virtually all of the 1947 telegram discussed above as indications of the NPS position on commercial fishing in the Park. Letter of Daniel B. Beard, Jr., Superintendent, Everglades National Park, to U.S. Senator Spessard L. Holland (Jan. 11 1956), Administrative Record part 2, at 15. These statements upon which OFF relies simply cannot be fairly read as guarantees that the NPS would never prohibit commercial fishing in the Park.

In holding that there was no contract never to prohibit commercial fishing, this court also notes that although there was a reservation of mineral rights in the federal statute authorizing creation of the Park, there was no such reservation of commercial fishing rights in the statute or the deed conveying the Park land to the United States. Where Congress has intended to permit commercial fishing in a national park, it has done so expressly by statute. See, e.g., 16 U.S.C. § 459a-1 (1982) (regarding the Cape Hatteras National Seashore) ("the legal residents of villages [within the Seashore] shall have a right to earn a livelihood by fishing within the boundaries [of the Seashore], subject to such rules and regulations as the . . .

Secretary may deem necessary. . . ."); 16 U.S.C. 230d (1982) (regarding the Barataria Marsh Unit of Jean Lafitte National Historical Park) ("Within the Barataria Marsh Unit, the Secretary shall permit hunting, fishing (including commercial fishing). . . ."); 16 U.S.C. § 410hh-4 (1982) (regarding the Malaspina Glacier Forelands Area of Wrangell-Saint Elias National Preserve, Cape Krusenstern National Monument, and the Dry Bay Area of Glacier Bay National Preserve) ("the Secretary may take no action to restrict unreasonably the exercise of valid commercial fishing rights or privileges obtained pursuant to existing law. . . ."). We find, therefore, that there is no basis in NPS' representations, federal legislation or the deed for the existence of the contract right asserted by

OFF. Since there is no such contract, OFF has no vested property right as a third-party beneficiary.

OFF's claim rests also in part on the 1929 Florida law, known as the Right to Fish Law. The Right to Fish Law provides in pertinent part that "[n]o water bottoms owned by the state shall ever be sold, transferred, dedicated, or otherwise conveyed without preserving in the people the absolute right to fish thereon, except as otherwise provided in these statutes." 14 Fla.Stat.Ann. 370.10 (1985 Supp. at 30). OFF claims that this law was implicitly subsumed in the conveyance of the Park land thereby guaranteeing OFF the right to fish commercially.

OFF does not contend that the 1929 Florida Right to Fish Law affords

it an absolute right to fish commercially without regulation. To the contrary, the law itself expressly permits regulation where provided for by statute. 14 Fla.Stat.Ann. § 370.10(1) (1985 Supp. at 30) ("except as otherwise provided in these statutes."). Assuming arguendo that OFF did so contend, our reading of the statute would not prohibit Florida's exercise of its conservatory, regulatory function. The United States, as Florida's successor in ownership of the Park land, would have the same power to regulate fishing in order to conserve Park resources. Only regulations inconsistent with the conservation function could potentially run afoul of the Florida statute. Therefore, even assuming that the Florida statute was subsumed in the conveyance,

the Right to Fish Law does not support OFF's contention that it has a vested property right in commercial fishing in the Park. Since OFF has no property right in commercial fishing in the Park, either by virture of the Florida statute or by virtue of a contract between Florida and the United States, OFF's substantive due process claim fails.[3/]

B. Estoppel

In the alternative, OFF argues that even if no contract existed between Florida and the United States, NPS should be estopped from enforcing the Rules. OFF claims it relied to its

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3/ We note that the State of Florida, which under OFF's theory was the actual party to the contract under which OFF claims third-party benefits, has been conspicuously silent.

detriment upon the representations made by NPS officials prior to the conveyance, and, moreover, that its reliance was reasonable.

The remedy of estoppel has its roots in equity. The traditional elements for an estoppel claim, which are designed to balance the equities of a case, are (1) a promise or misrepresentation of fact, (2) reasonable reliance on the misrepresentation or promise, and (3) the reasonableness of such reliance. See Heckler v. Community Health Services, ____ U.S. ____, ____, 104 S.Ct. 2218, 2223-24, 81 L.Ed.2d 42, 51-52 (1984). Assuming, but expressly not deciding that estoppel against the government is a viable claim, OFF's argument fails because the representations made by NPS officials were simply not promises of

the type upon which all estoppel claims must be based. As noted above, the contemplation of the parties that commercial fishing would not be prohibited in the Park was subject to NPS' retention of its conservation function. Although commercial fishing was deemed consistent with NPS' conservation function for forty years, it is not surprising nor inequitable that the NPS, in exercising its conservation function, might prohibit commercial fishing today. OFF could not reasonably believe that commercial fishing would never run afoul of NPS' reasonable exercise of its conservation function. Assuming OFF relied upon the NPS representations, that reliance was unreasonable. Since OFF fails to establish the traditional requirements for estoppel, this claim

will not prohibit the enforcement of the instant regulations.

C. Administrative Procedure Act

Finally, OFF claims that the NPS rules were adopted in violation of the Administrative Procedure Act (the "APA"). 5 U.S.C. § 706(2)(a) (1982). The APA requires a court to set aside agency rules if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Id. As a district court correctly noted, judicial review of administrative action should be highly deferential to the agency. Organized Fishermen of Florida v. Watt, 590 F.Supp 805, 811 (1984), citing Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978), and

Camp v. Pitts, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973). Moreover, there is a presumption of administrative regularity. See Vermont Yankee, 435 U.S. 525, 98 S.Ct. 1202. The applicable standard of review is stated in Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43-44, 103 S.Ct. 2856, 2866-67, 77 L.Ed.2d 443 (1983):

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

OFF claims that the rules are invalid because they represent a depar-

ture from established NPS policy, they distribute a limited resource on an arbitrary and discriminatory basis, and they are not rationally connected to the facts in the record. As previously stated the instant rules are not the first regulation of commercial fishing in the Park. Shortly after the Park was established the NPS promulgated regulations concerning commercial fishing. Administrative Report part 10, at 28-29. Moreover, the NPS continued to exercise its conservation function up to the time the instant regulations were promulgated.[4/] OFF's claim that the rules

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4/ In the years following the establishment of the Park, the NPS has forbidden fishing in certain areas, has limited the types of equipment which could be used, and has forbidden the taking of certain species of fish. Administrative Record part 10, at 28-29.

depart from established NPS policy, therefore, is meritless.

OFF also claims that the rules irrationally discriminate against commercial fishermen and that they bear no reasonable relation to the facts on the record. The task of weighing the competing uses of federal property has been delegated by Congress to the Secretary of the Interior. Udall v. Washington, Virginia & Maryland Coach Co., 398 F.2d 765, 769 (D.C.Cir.), cert. denied, 393 U.S. 1017, 89 S.Ct. 622, 21 L.Ed.2d 561 (1968). Consequently, the Secretary has broad discretion in determining how best to protect public land resources. Sierra Club v. Andrus, 487 F.Supp. 443, 448 (D.C.D.C. 1980), aff'd sub nom. Sierra Club v. Watt, 659 F.2d 203 (D.C.Cir. 1981). See 16 U.S.C. § 1

(1982). In light of the consideration given to the information gathered from a variety of interest groups and the careful consideration given to the Rules' impact on commercial fishing, it cannot be said that the Secretary abused his discretion in promulgating the Rules. The facts in the record sufficiently support the Secretary's decision. The Rules, therefore, survive OFF's attacks and are not arbitrary and capricious.

On the basis of the foregoing, the decision of the district court is AFFIRMED.[5/]

5/ The district court rejected a number of other claims raised by OFF. Organized Fishermen of Florida v. Watt, 590 F.Supp. 805 (S.D.Fla. 1984). These claims are not raised on appeal and are, therefore, abandoned. Fed.R.App.P. 28(a)(4). See Harris v. Plastics Mgf. Co., 617 F.2d 438, 440 (5th Cir. 1980).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 80-0789-Civ-SMA.

ORGANIZED FISHERMEN OF FLORIDA, Herbert Z. Marvin, Victor H. Markley, and Clyde R. Raffield,

Plaintiffs,

v.

James WATT, Secretary of the U.S. Dept. of the Interior; Russell Dickensen, Director of the National Park Service; Bob Baker, Regional Director of the Southeast Regional Office of the National Park Service; John Morehead, Superintendent of Everglades National Park; the U.S. Department of the Interior; the National Park Service; and Everglades National Park,

Defendants,

Everglades Protection Association, Inc., & World Wide Sportsmen, Inc.,

Intervenors.

[July 6, 1984]

MEMORANDUM OPINION

GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

I. - NATURE OF THE ACTION

Plaintiffs seek declaratory and injunctive relief, 28 U.S.C. §§ 2201, 2202, prohibiting defendants from enforcing 36 C.F.R. §7.45(e)-(h), as amended at 45 Fed. Reg. 10350 (1980).

These regulations, which became effective on March 17, 1980, restrict certain fishing practices in Everglades National Park by: (1) imposing bag limits of ten fish of one species and not more than a total of twenty fish of all species; (2) prohibiting all commercial fishing in Park waters as of December 31, 1985; and (3) establishing sanctuaries for en-

dangered and threatened species within the Park by closure of certain areas to all public entry.

Heretofore this Court denied Plaintiffs' Motion for Preliminary Injunction after an evidentiary hearing. Organized Fishermen of Florida, etc. v. Andrus, etc., 488 F.Supp. 1351 (1980). Many of the same issues addressed at that hearing are readdressed here after the record has been supplemented by a complete Administrative Record of Proceedings ("AR"), additional discovery, and pleadings. This matter is presently before the Court upon cross-motions for summary judgment.[1]

1/ Everglades Protection Association, Inc. and World Wide Sportsmen, Inc., recreational sports fishermen were allowed to intervene herein and have essentially adopted the Defendants' position. See Intervenors' Memorandum in Response to Motion for Summary Judgment (Doc. No. 130). Intervenors have not filed a separate motion for summary judgment.

II. - PLAINTIFFS' ISSUES

Although Plaintiffs have stated their issues in more specific terms as hereinafter noted, essentially Plaintiffs' Amended Complaint charges, in Plaintiffs' words at Plaintiffs' Cross-Motion for Summary Judgment, p. 17:

> "This case is a blatant example of governmental over-reaching. Eager to placate wrongheaded sports fishing interests, Defendants (the "Government") adopted regulations eliminating commercial fishing in the Park knowing full well that such regulations violate their agreement with the State of Florida, that commercial fishing has not been adversely affecting Park resources, and that the Park's own data did not support the conclusion that commercial fishing should be banned . . ."

III. - THIS COURT'S PRIOR MEMORANDUM OPINION DENYING INJUNCTIVE RELIEF

This Court's prior Order at 488 F.Supp. 1351 (1980), supra, set forth many grounds that were advanced by Plaintiffs. The statements of law therein set forth and found by the Court are still applicable with equal force upon the more complete record now before the Court, and thereupon, that prior Memorandum Opinion is hereby ADOPTED and made a part hereof.

After this Court entered its Memorandum Opinion on April 29, 1980, this cause was held in abeyance at the suggestion of the parties until cross-motions for summary judgment could be filed. During the interim Defendant NATIONAL PARK SERVICE held numerous public and private meetings with Plaintiffs and other interested parties.

IV. - FACTUAL BACKGROUND

The following factual matters advanced by Defendants are supported and uncontradicted in the record:[2]

1. In 1934, Congress enacted the law which authorized establishment of the Park at such time that title to sufficient lands in the region of the Everglades had been vested in the United States. 16 U.S.C. §410.

2. The 1934 Act provided for the administration of the Park in accor-

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2/ At footnote 2 of Plaintiffs' Cross-Motion for Summary Judgment, Plaintiffs concede, for the most part, the correctness of these facts except for objections to certain statements expressing the law, and complain that material facts upon which Plaintiffs claims are based were omitted. The Court has reviewed those material facts as set forth in Plaintiffs' Statement of Material Facts and has supplemented the factual statement herein by reference to some of those uncontradicted facts.

dance with generic National Park Service ("NPS") authorities, Sections 1 and 2-4 of Title 16, subject to protection of the existing rights of the Seminole Indians. 16 U.S.C. §410b. Congress further provided that the area be administered as a wilderness, and that the unique flora and fauna and essential primitive natural conditions then prevailing in the area be preserved intact. 16 U.S.C. §410c.

3. The legislation made no reference to commercial fishing.

4. At the time the Florida legislature considered the legislation to authorize the donation of state lands and funds for the Park, one legislator and several officials of the State government sought clarification of the views and policies of the NPS regarding

commercial fishing. (AR-2) The Director of the NPS stated that it was his view that commercial fishing would be permitted to continue after the establishment of the Park. Other similar statements were made subsequently. (AR-2)

5. Following formal establishment of the Park in 1947, the NPS promulgated regulations regarding commercial fishing. (AR-10, pp. 28-29)

6. On February 7, 1978, the Superintendent of the Park received a petition bearing close to 5,000 names, expressing concern over the "diminishing sport fish population" and requesting that the NPS establish bag limits on redfish and trout throughout the Park. (AR-6) In response to the petition and other complaints regarding the condition of the sport fishery in the Park (AR-5),

the NPS undertook a study of the fishery resource using computerized data acquired during the preceding years from commercial and sport fishermen.

7. The NPS examined various management options designed to reduce pressures on the fishery resources and to allocate those resources among park wildlife, recreational fishermen, and commercial fishermen. The NPS commissioned Centaur Associates, Inc. to study the socio-economic impacts associated with the various management alternatives under consideration. In December 1978, the Socio-economic Assessment of Fishery Management Options - Final Report was completed. (AR-8)

8. In January 1979, the Park Service issued the Assessment of Fishery Management Options in Everglades National

Park, Florida ("Assessment") (AR-10), which contained the results of its own analyses and those provided by the Centaur Report.

9. The NPS held four public workshops in South Florida. The workshops were attended by over 600 people. (AR-30, p. 3) Special interest groups represented included commercial fishermen, sport fishermen, guide fishermen, conservation groups, and boaters. (AR-30, p. 3) Written comments were also received and reviewed. (AR-24) There was consultation with the State of Florida Department of Natural Resources, federal agencies and the American Crocodile Recovery Team. (AR-15, 19, 20, 21, 22, 28, 29)

10. Following analysis of the public comments, the NPS prepared a

Review of Fishery Management Alternatives, Everglades National Park ("Review"). (AR-30) The Review summarized the NPS findings on the impacts of the numerous proposed options. The Review identified the preferred alternatives for a proposed rulemaking and the reasons for selecting those alternatives. It also stated that no Environmental Impact Statement ("EIS"), pursuant to Section 102(C) of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. 4332, was required.

11. The proposed rulemaking was published in the Federal Register on September 14, 1979, 44 Fed. Reg. 53541. The bases for selecting the proposed alternatives were set forth in the Supplementary Information section of the Federal Register notice. The notice

requested public comment for 60 days. (AR-31)

12. Public hearings were held in four locations: North Miami, Homestead, Marathon, and Naples, Florida, on October 9-13, 1979. (AR-42 - 45)

13. In addition, public response was solicited by distribution of an information packet (AR-32) to people who had registered at the workshops, holders of commercial and guide fishing permits, organizations which had commented on the Assessment, and persons attending the public hearings.

14. Additional written comments were exchanged between the NPS and the Fish and Wildlife Service ("FWS"), National Marine Fishery Service ("NMFS"), Florida State Department of Natural Resources, and the American Crocodile

Recovery Team. (AR-33, 35, 38, 40, 41, 49, 50, 51, 57, 58)

15. Hundreds of written comments were received from individuals, interest groups, and members of Congress. (AR-52, 53, 54, 55, 56)

16. Consultation pursuant to Section 7 of the Endangered Species Act, 16 U.S.C. 1531 et seq., disclosed the existence of several endangered and threatened species in the Park. (AR-34) The FWS provided its opinion of the impact the proposed regulations would have on the American crocodile. (AR-36, 37) Other endangered or threatened species which the FWS believed might be in the Park were:

American alligator	-	threatened
Arctic peregrine falcon	-	endangered
Bald eagle	-	endangered
Brown pelican	-	endangered
Cape Sable sparrow	-	endangered
Florida everglade kite	-	endangered

Florida manatee	-	endangered
Green turtle	-	endangered
Hawksbill turtle	-	endangered
Kemp's ridley turtle	-	endangered
Leatherback turtle	-	endangered
Loggerhead turtle	-	threatened

The FWS requested additional information on these species from the NPS. (AR-34)

17. The NPS supplied the information requested by the FWS (AR-46), and the FWS subsequently provided additional information on the effect of the proposed regulations on the Florida manatee. They found, inter alia, that the proposed regulations would have no negative effects on any of the species. (AR-60)

18. Following analysis of the public comments and internal review by the NPS, the final regulations were published in the Federal Register on February 15, 1980, 45 Fed. Reg. 10350. (AR-61)

19. On March 7, 1980, the NPS corrected the omission of section (h), Prohibition of Commercial Fishing, from the final rules, 45 Fed. Reg. 14854. (AR-62)

20. On April 3, 1980, the NPS corrected the omission of an exemption for commercial net fishermen from the bag limits on mullet and pompano, 45 Fed. Reg. 22023. (AR-63)

21. In October 1936, the Florida Legislature's Committee on Lands and Boundaries submitted a report to the Everglades National Park Commission relating to boundaries for the proposed Park. (AR-1) The Boundaries Report included the text of a letter dated July 18, 1936, from Arno Cammerer, the Director of the National Park Service, to Florida Congressman J. Hardin Peterson:

Whenever the question has been asked, these fishermen [in national parks] have been informed that the National Park Service does not contemplate any injustice to them, nor any curtailment of their legal operations. With [this] as a background, commercial fishermen using the waters surrounding the Everglades may expect equally fair treatment. As a conservation bureau, the National Park Service would naturally have to keep an eye on commercial fishery operations and see to it that the supply is conserved. Usually the same laws that are in force outside a national park apply also within, and it would be reasonable to expect that in the administration of this park care would be taken to provide restrictions similar to those in nearby waters unless the destruction of some variety of fish is definitely threatened. In other words, since the Everglades park area and especially its coastal water area is so great, I have seen no reason why off-coast commercial fishing may not be continued in the future as it has in the past without injury to park values. [Emphasis added]

22. On January 5, 1939, A.E. Demaray, the Acting Director of the National Park Service, wrote to William Demeritt of the Everglades National Park Committee:

> The National Park Service has stated from time to time that commercial fishing will not be prohibited in the proposed park. . . . Please assure the members of the Chamber of Commerce that the National Park Service will not make rules and regulations that will jeopardize the fishing industry of the Florida Keys.

23. Plaintiffs also cite to letters/correspondence and/or committee reports of various federal and state legislative and administrative officials at AR-2, p. 1; AR-1, p. 5; AR-2, pp. 2, 3; AR-2, p. 7; AR-2, pp. 14, 15; AR-10, p. 29; and, others.[3]

3/ Paragraphs 21 and 23 above are cited by Plaintiff to support their contention that Ever-

(footnote continued)

V. ISSUES

Plaintiffs' claims encompass Constitutional, contractual, administrative, and environmental issues. The Constitutional questions, in large measure, were previously examined by this Court at the injunctive hearing and the ruling thereon. Those rulings remain applicable and are REAFFIRMED.

A. Are The Challenged Regulations A Proper Exercise Of The Secretary's Authority To Administer The National Parks Or Are They Arbitrary And Capricious

(a) Standard of Review

Judicial review of administrative action should be highly deferential

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3/ (footnote continued)

glades National Park was established on the basis of direct and implied repeated assurances by the United States Government to the State of Florida and its commercial fishermen that commercial fishing within the Park would never be prohibited by the United States.

to the agency. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978); Camp v. Pitts, 411 U.S. 138 (1973). The courts should neither substitute their judgment for that of the agency nor rewrite an agency's regulations by reading requirements into statutes which are not clearly there. Furthermore, there is a presumption of administrative regularity. As stated in Vermont Yankee, supra, 435 U.S. at 525, the Court of Appeals "had seriously misread or misapplied this statutory and decisional law cautioning review courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." The formulation of agency procedures "was basically to be left within the discretion of the agencies to which Congress

had confided the responsibility for substantive judgments." Id. at 524. The Court concluded that policy matters such as those the Plaintiffs here challenge are to be resolved in other branches of government and are "not subject to reexamination in the federal courts under the guise of judicial review of agency action." 435 U.S. at 558. Agency officials are credited with conscientious review of the issues presented to them, Hercules, Inc. v. EPA, 598 F.2d 91, 123 (D.C. Cir. 1978), and unless the Secretary's action is arbitrary or capricious, it must be upheld.

Also relevant to judicial review here is the well established principle that an agency's interpretation of its own statutes and regulations

is entitled to great deference. Train v. NRDC, 421 U.S. 60, 75 (1975); Udall v. Tallman, 380 U.S. 1, 16-17 (1965). Here, of course, we are dealing with the administration of the NPS Organic Act, 16 U.S.C. 1 et seq., implementation for which the Secretary of the Interior has primary responsibility. In terms of NEPA, we are dealing with an agency's application of the statute to its own program.

The applicable standard was rearticulated in the recent Supreme Court opinion in Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 103 S.Ct. 2856 (1983):

> "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the

> agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' . . . In reviewing that explanation, we must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. [Emphasis added].

Id. at 2866-67 [citations omitted].

The relevant questions which should be addressed are:

1. Did the agency rely on factors Congress intended it to consider?

2. Did the agency entirely fail to consider an important aspect of the problem?

3. Does the agency's explanation run counter to the evidence before it?

4. Is the agency's explanation so implausible that it could not be ascribed to a difference in view or the product of agency expertise?

(b) A Proper Exercise of the Secretary's Broad Discretionary Authority

The task of weighing the competing uses of federal property has been delegated by Congress to the Secretary of the Interior. Udall v. Washington, Virginia and Maryland Coach Co., 398 F.2d 765, 769 (D.C. Cir.), cert. denied, 393 U.S. 1017 (1968). As such, the Secretary has "broad discretion in

determining what actions are best calculated to protect park or public land resources." Sierra Club v. Andrus, 487 F.Supp. 443, 448 (D.C.D.C. 1980). The balance which he strikes will not be judicially upset unless it is arbitrary or beyond his authority. "Error or unwisdom is not equivalent to abuse." Udall v. Washington, Virginia and Maryland Coach Co., supra.

Congress established the National Park Service in 1916. The "fundamental" purpose of the NPS is

> "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

16 U.S.C. 1.

Congress empowered the Secretary of the Interior to "make and publish such rules and regulations as he may deem necessary or proper for use and management of the parks . . . under the jurisdiction of the National Park Service." 16 U.S.C. 3. And,

> ". . . the authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established except as may have been or shall be directly and specifically provided by Congress." 16 U.S.C. 1a-1. [Emphasis added].

Congress authorized the establishment of Everglades National Park in 1934, 16 U.S.C. 410, and directed that the area or areas ultimately included in the Park be "permanently reserved as a

wilderness, and no development . . . shall be undertaken which will interfere with the preservation intact of the unique flora and fauna and the essential primitive natural conditions now prevailing in this area." 16 U.S.C. 410c.

Commercial fishing is not provided for in the enabling legislation for Everglades National Park, nor in any subsequent legislation pertaining to the Park.[4] At no time has Congress directed

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4/ Where Congress has intended to permit commercial fishing in a national park it has said so explicitly. See, e.g.:

> Cape Hatteras National Seashore (17 August 1937) 16 U.S.C. Section 459a-l states: ". . . that the legal residents of villages (within the seashore) shall have the right to earn a livelihood by fishing within the boundaries (of the seashore), subject to such rules and regulations as the Secretary may deem necessary. . . ."

(Footnote continued)

the Secretary to take any particular actions with regard to commercial fish-

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4/ (Footnote continued)

Cape Krusenstern National Monument (2 December 1980) 16 U.S.C. Section 410hh-4 states: ". . . the Secretary may take no action to restrict unreasonably the exercise of valid commercial fishing rights or privileges obtained pursuant to existing law. . . ."

Glacier Bay National Preserve - Dry Bay Area (2 December 1980) 16 U.S.C. Section 410hh-4 states: ". . . the Secretary may take no action to restrict unreasonably the exercise of valid commercial fishing rights or privileges obtained pursuant to existing law. . . ."

Jean LaFitte National Historical Park - Barataria March Unit (10 November 1978) 16 U.S.C. Section 230d states: "Within the Barataria Marsh Unit, the Secretary shall permit hunting, fishing (including commercial fishing). . . ."

Wrangell-Saint Elias National Preserve - Malaspina Glacier Forelands Area (2 December 1980) 16 U.S.C. Section 410hh-4 states: ". . . the Secretary may take no action to restrict unreasonably the exercise of valid commercial fishing rights or privileges obtainer pursuant to existing law. . . ."

ing within the Park. Commercial fishing like all other activities, has been subject to the Secretary's broad administrative authority since the Park was established.

Thus, over the years, the NPS has forbidden fishing in certain areas, has limited the type of equipment which could be used, has restricted the number of some types of fish which could be caught, and has forbidden the taking of certain species of fish. (AR-10, pp. 28-29) The regulations challenged herein are a continuation of NPS's efforts to administer the Park in a manner most consistent with the purposes for which it was established.

The regulations at the heart of the dispute herein do the following:

1) Establish sanctuaries for endangered and threatened species within the Park by closure of certain areas to all public entry;

2) Restrict recreational shellfish harvest;

3) Establish limits for fish species; and

4) Eliminate commercial fishing in the Park by December 31, 1985. (AR-61, 62)

As the Administrative Record indicates, the process which culminated in these regulations began after the superintendent of the Park received a petition with close to 5,000 signatures complaining that the sport fish population was being depleted. (AR-6) The NPS undertook a study of the fishery resource using computerized data ac-

quired during the preceding years from commercial and sport fishermen. A private consulting firm was hired which assembled socio-economic data. Fish populations were studied, catch rates were projected, socio-economic effects were reviewed, public workshops and public hearings were held at which the views of the public, especially those of park users, including commercial fishermen, sport and recreational fishermen, professional guides, environmentalists and conservationists were aired. Reports on endangered species were also received.

While there seemed to be general agreement from all parties that the fish resource had to be protected, there was substantial disagreement on the extent of the problem and its cause.

Some blamed the commercial fishermen, some blamed the quality of the water, others attributed the problems to the development of southern Florida, and others stated that it was past NPS management decisions. Still others stated that there was no crisis at all and that placing restrictions on fishing had no connection to any problem. Some felt that there should be an immediate ban on commercial fishing and stricter limits on the recreational catch permitted. Recreational fishermen and guides complained that the quality of their fishing experience had declined and blamed the commercial fishermen. Conservationists expressed concern for endangered species. (AR-42-45, 52-56)

All of the aforegoing information was available to the Secretary, to be considered within the context of his statutory mandate, when he decided to establish the sanctuary areas, phase-out commercial fishing, and to establish the other fishing limitations. The elimination of the harvesting of certain shell fish, the establishment of bag limits and the elimination of commercial fishing, in the Secretary's judgment, encourage the growth of the affected fish populations, thereby restoring the historic age and size distributions of affected species, and enhancing the populations by the number of fish which would have been taken by the commercial fishermen. The ban on commercial fishing will further the goal of preserving the wilderness characteristics for which

the Park was established. Bag limits on hook and line fishing will reduce competition between sport and commercial fishermen for spotted sea trout. Likely net encounters involving endangered species such as crocodiles, manatees, and sea turtles will be minimized, if not eliminated, and the elimination of boats from the sanctuary areas will encourage the flourishing of a safe habitat.

These steps are hardly arbitrary and capricious. They are consistent with the purposes for which the Park exists as expressed in the statutes quoted above and are consistent with NPS management policies on fishing.[5] The

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5/ The NPS management policies on fishing are found as AR-4.

Secretary could have taken the actions he has taken under the broad management authority delegated to him by Congress. 16 U.S.C. 1, 2-4; 16 U.S.C. 410 et seq. Commercial exploitation of the natural resources is not one of the purposes for which Congress established the Park. The Secretary, as a matter of policy, can implement measures, such as those challenged herein, which in effect, eliminate one predator from the Park and enhance the use of the park by recreational users.

These were not the only steps that could have been taken. Indeed, some may think the Secretary has not gone far enough to restrict fishing activities; others, think he has gone too far. But it is the Secretary to whom Congress has entrusted the authority to make these judgments.

B. Plaintiffs Are Not Third-Party Beneficiaries Of An Agreement Between The State of Florida And The Federal Government

Essentially, Plaintiffs maintain that the ceding of the Park lands by the Florida legislature to the United States created a contract between the State of Florida and the United States which prevents the Defendants from adopting the subject regulations prohibiting commercial fishing. The representations relied upon by Plaintiffs were made by Park Service Officials to United States Senator Holland, United States Congressman Hardin, a State Legislator, and an official of a private fishermen's association. However, the contract, if any, was entered into by Congress when it established the Park by legislation and there is no mention in such legis-

lation of any commercial fishing privileges or rights.[6] Many of the representations were made after the property was transferred to the United States. Furthermore, this Court is without jurisdiction to grant specific performance of a contract, if any, between the United States and the State of Florida, absent waiver of sovereign immunity. Larson v. Domestic and Foreign Commerce Corporation, 337 U.S. 682, 703-04 (1949). As stated by the former Fifth Circuit, the test of whether a suit is barred by the doctrine of sovereign immunity in a specific performance context is whether "the effect of the judgment would be to restrain the government from acting or to compel it to

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6/ See note 4, supra.

act." Alabama Rural Fire Insurance Company v. Naylor, 530 F.2d 1221 (5th Cir. 1976). Here, the object of the instant suit, no matter how it is expressed, seeks quite clearly to compel the Defendants in their official capacity to specifically perform a contract.

C. No Violation Of Interior Department Rulemaking Procedures

Plaintiffs contend that the "required" economic consequences analysis was not conducted because the Department mistakenly concluded that the Rule was not "significant". In this Court's earlier Opinion at 488 F.Supp. 1351, 1354, supra, this Court stated:

> "[T]he Court cannot conceive that the procedures for the development of 'significant' rules were ever intended to apply in the circumstances of the instant case."

This conclusion is bolstered by the regulatory definition of the term "significant" and the analysis therein contained in said Memorandum Opinion.

Additionally, Plaintiffs lack standing under Count I because there is no private right of action under Executive Order 12044 which was the Order establishing the criteria for rulemaking in this area.

In any event, the Secretary complied with all departmental rulemaking policies and procedures in effect at the time the fishing regulations were promulgated.

D. Plaintiffs Lack Standing To Challenge Defendants' Alleged Non-Compliance with NEPA

To have standing in federal court a party must demonstrate both that

the challenged act will injure him in fact and that his interest is arguably within the zone of interest to be protected by the statute at issue. Ass'n of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1972). In the present case plaintiffs have adequately established the first requirement, economic injury-in-fact. However, plaintiffs are simply unable to show that their interests are within the zone of interests protected by NEPA. NEPA was not created to protect purely economic concerns. Rather, plaintiffs must demonstrate "concern for, or connection with, an environmental interest" to have standing under NEPA. Presidio Bridge Company v. Secretary of State, 486 F.Supp. 288, 289 (W.D. Tex. 1978), aff'd 612 F.2d 578 (5th Cir.), cert. denied

449 U.S. 837 (1980); see also Sierra Club v. Morton, 405 U.S. 727 (1972). Since plaintiffs have made no such showing, defendants are entitled to summary judgment on the NEPA claim.

E. The Regulations are Not Unconstitutionally Vague

Plaintiffs contend that the bag limit aspect of the Regulation, 36 C.F.R. § 7.45(f), is unconstitutionally vague in two respects. First, plaintiffs assert that application of bag limits to commercial net fishermen contradicts other portions of the Regulations, thereby rendering the Regulations unconstitutionally vague. However, on April 3, 1980, some two and one-half years before plaintiffs filed their amended complaint, the Regulations were amended to correct the inadvertent

omission of an exception from the bag limits for fishermen holding valid commercial permits for mullet and pompano netting. 45 Fed.Reg 2202, April 3, 1980. 36 C.F.R. § 7.45(f)(17). Said exception negates any perceived ambiguity in this area.

Plaintiffs second contention is that since the Regulations exclude "bait fish" from the bag limits and do not define that term, the Regulations are unconstitutionally vague. The problem with this contention is that 36 C.F.R. § 7.45(f)(6) enumerates those species of fish the Secretary considers "bait." Therefore, the Regulations are not unconstitutionally vague.

F. The Regulations Do Not Constitute An Unconstitutional Taking of Property

At Count VI of their amended complaint plaintiffs contend that by immediately restricting their permits and cancelling the permits after December 31, 1985, the Regulations constitute a taking of property without due process. However, the annual permits are merely a license to conduct commercial fishing activity within the Everglades National Park. The permit is a privilege granted by the Park Service and is, therefore, by its very nature, revocable.

The Ninth and Tenth Circuit Courts of Appeal have concluded that holders of permits allowing grazing on United States property are not entitled

to compensation when their grazing rights are terminated. Pankey Land & Cattle Company v. Hardin, 427 F.2d 43 (10th Cir. 1970); Osborne v. United States, 145 F.2d 892 (9th Cir. 1974). In Osborne the court stated:

> . . . No grant of United States property may be made except by virtue of Congressional authorization [citations omitted], and the mere authority given the Forest Service to make appropriate regulations carries with it no authority to alienate for any period of time any phase of government right over the full use of its lands or to make any agreement regarding them subject to the payment of compensation for its revocation.

Id. at 896. Moreover, a permit for grazing has been considered "a privilege which is withdrawable at any time for any use by the sovereign without payment of compensation." Id. Similarly,

plaintiffs in the instant case have no Fifth Amendment taking claim.

Even assuming, however, that plaintiffs have a legitimate claim of entitlement, the constitutional requirements of due process have been satisfied for the reasons stated in the Memorandum Opinion cited above.

Plaintiffs have argued other issues of law which have been carefully reviewed and considered. These issues are hereby found to be without merit.

On the basis of the foregoing, the entry of summary judgment for the defendants and against the plaintiffs is warranted. It is thereupon

ORDERED AND ADJUDGED as follows:

1. Defendants' Motion for Summary Judgment (Doc No. 107) be, and the same is hereby, GRANTED;

2. Plaintiffs' Cross-Motion for Summary Judgment (Doc. No. 123) be, and the same is hereby, DENIED;

3. Each party shall bear its own costs; and

4. A Final Judgment shall be entered herein reflecting the aforegoing.

DONE AND ORDERED in Chambers at Miami, Southern District of Florida, this 6 day of July, 1984.

/s/ Sidney M. Aronovitz
UNITED STATES DISTRICT JUDGE

cc:

Parker Thomson, Esq.
Steven Herman, Esq.
David McIntosh, Esq.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 80-789-Civ-SMA

ORGANIZED FISHERMEN OF FLORIDA, Herbert Z. Marvin, Victor H. Markley and Clyde R. Raffield,

Plaintiffs,

v.

Cecil D. ANDRUS, Secretary of the United States Department of the Interior, William J. Whalen, Director of the National Park Service, Joseph Brown, Regional Director of the Southeast Regional Office of the National Park Service and Claude McClain, Acting Superintendent of Everglades National Park, United States Department of the Interior, the National Park Service, and Everglades National Park,

Defendants,

[April 29, 1980]

ORDER DENYING PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION

This matter was heard by the Court at an evidentiary hearing upon Plaintiffs' Motion for Preliminary Injunction. The Court has received testimony, affidavits, exhibits and has heard oral argument of counsel for the parties. The Court having reviewed the entire record, including the memoranda and supplemental affidavits submitted by the parties, Plaintiffs' Motion for Preliminary Injunction is DENIED for the reasons which follow.

FACTUAL BACKGROUND

Plaintiffs[1/] are seeking to enjoin enforcement of 36 C.F.R. § 7.45

1/ Plaintiff Organized Fishermen of Florida is a non-profit organization comprised of approxi-

(footnote continued)

(e)-(h), as amended at 45 Fed.Reg. 10350 (1980), promulgated by the National Park Service of the Department of the Interior. These regulations, which became effective on March 17, 1980, restrict certain fishing practices in Everglades National Park by: (1) imposing bag limits of ten (10) fish of one species and not more than a total of twenty (20) fish of all species; and (2) prohibiting all commercial fishing in Park waters as of

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1/ (footnote continued)

mately 1500 members, some 100 of whom fish in Everglades National Park. Plaintiff Herbert Z. Marvin holds a commercial net fishing permit from the Park. Plaintiff Victor H. Markley holds a commercial hook-and-line fishing permit from the Park. Plaintiff Clyde R. Raffield holds a commercial trap fishing permit from the Park.

December 31, 1985.[2/] In addition, Plaintiffs move the Court for an Order requiring Defendants to remove pilings and other obstructions placed at the entries of Little Madeira Bay and Joe Bay, which are among several areas of Florida Bay designated as critical habitat for endangered species, and now closed to all public entry for the purposes of establishing crocodile

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2/ There are no bag limits on crustacean harvest. So too, net fishermen of mullet and pompano are specifically exempted from the bag limits under 36 C.F.R. § 7.45(f)(17), as amended in 45 Fed.Reg. 22023 (1980). In essence, then, commercial trap fishermen such as Plaintiff Clyde R. Raffield and commercial net fishermen such as Plaintiff Herbert Z. Marvin are unaffected by these restrictions until the prohibition of all commercial fishing becomes effective after December 31, 1985. Stated otherwise, the only immediate impact of these restrictions is upon the 63 holders of commercial hook-and-line fishing permits from the Park.

sanctuaries.[3/] 36 C.F.R. § 7.45(g)(4), as amended at 45 Fed.Reg. 10350 (1980).

ISSUES RAISED BY PLAINTIFFS

The issues Plaintiffs raise in support of their Motion are manifold, but can be summarized as follows. First, Plaintiffs assert that the instant regulations are invalid as having been promulgated in contravention of the procedural requirements of the Department of the Interior, the National Environmental Policy Act of 1969, and the Administrative Procedure Act.

3/ Other areas of the Park totalling some 90,000 acres have from time to time been closed to fishing, commercial or otherwise, for related purposes. See, e.g., 36 C.F.R. § 7.45(g)(15)-(17) (1979). The areas closed pursuant to the instant regulations constitute only a small portion of northeast Florida Bay (13%), and only 18,000 acres of the total 660,000 estuarine acres of the Park.

Secondly, Plaintiffs argue that the instant regulations are constitutionally infirm as violative of the Privileges and Immunities Clause of the Constitution, and the Fifth Amendment guarantees of due process and equal protection. Finally, Plaintiffs maintain that Defendants are estopped to enforce the regulations herein, said regulations being contrary to representations allegedly made by federal officials regarding continued commercial fishing rights in the Park. Enforcement of the instant regulations, Plaintiffs insist, will immediately and effectively preclude commercial fishing in the Park, and the right of Plaintiffs to earn a livelihood therefrom.

REQUIREMENTS FOR PRELIMINARY INJUNCTION

The Court is governed herein by the four prerequisites for preliminary injunctive relief, as set forth in Canal Authority of State of Florida v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974): (1) a substantial likelihood that Plaintiffs will prevail on the merits; (2) a substantial threat that Plaintiffs will suffer irreparable injury if the injunction is not granted; (3) the threatened injury to Plaintiffs outweighs the threatened harm the injunction may do to Defendants; and (4) granting the preliminary injunction will not disserve the public interest.

MERITS OF PLAINTIFFS' MOTION

Plaintiffs have failed to carry their initial burden of demon-

strating a substantial likelihood of prevailing on the merits. To begin with, Plaintiffs have not clearly shown that the decision of the National Park Service not to prepare "a regulatory analysis of the economic consequences of a rule" in connection with promulgation of the instant regulations violated Department of Interior rulemaking procedures.[4/] A regulatory analysis is required only if (1) a proposed rule is deemed "significant" as defined in 43 C.F.R. § 14.3(c)(5); and (2) the rule will have an annual economic effect of

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4/ A regulatory analysis contains: (i) a succinct statement of the problem being addressed and objectives of the rule; (ii) a description of the major alternative ways of achieving the objectives that were considered by the bureau; (iii) an analysis of the economic consequences of each of the alternatives; and (iv) a detailed explanation of the reasons for choosing one alternative over the others. 43 C.F.R. § 14.4(d)(2) (1979).

$100 million or more, or (3) the potential economic effect is considered sufficiently major even though less than $100 million. 43 C.F.R. § 14.3(d) (1979). Rules are "significant" within the meaning of 43 C.F.R. § 14.3(c)(5) (1979), if they are "likely to have a substantial economic effect on the entire economy or on an individual region, industry or level of government." A "region" is a geographic area ordinarily covering more than one state. 43 C.F.R. § 14.3(d)(3)(ii) (1979). "Economic effects" means changes in the use of resources which, in principle, would affect national income and which

can be valued in dollar terms.[5/] 43 C.F.R. § 14.3(d)(3)(i) (1979). In light of these guidelines, the Court is not convinced that the regulations herein are "significant", and that preparation of a regulatory analysis was thereby required. On the contrary, the Court cannot conceive that the procedures for the development of "significant" rules were ever intended to apply in the circumstances of the instant case. The impact of the regulations herein is clearly not "regional" in scope, their applicability confined to the Park, and even then involving the closure of only

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5/ Plaintiffs argue that the economic effect of banning commercial fishing on consumers of seafood should have been considered in assessing the significance of such a rule. However, Department of Interior procedures make clear that for purposes of determining the necessity of a regulatory analysis, "economic effects" does not include measures of consumers' willingness to pay. 43 C.F.R. § 14.3(d)(3)(i) (1979).

limited portions thereof. See note 3 supra. With respect to the impact of the regulations on the commercial fishing industry, the annual economic loss is estimated at $1.21 million, representing 0.5% of the total worth of Florida's commercial fishing industry and 1.8% of the value of landings in Collier and Monroe counties alone.

Plaintiffs have further not persuaded the Court that Defendants have violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332. At issue is the National Park Service's determination that the instant regulations do not amount to "major federal action significantly affecting the quality of the human environment." On the evidence presented, the Court cannot say that Defendants' threshold

determination not to file an Environmental Impact Statement was unreasonable. Save Our Ten Acres v. Kreger, 472 F.2d 463, 467 (5th Cir. 1973). In this regard, the Court notes that the "Assessment" and subsequent "Review" of fishery management options in Everglades National Park, prepared at the direction of the National Park Service, indicate that considerable attention was given to alternative courses of action and the economic and environmental consequences of each, with a view towards minimizing the impact on the environment.[6/] The Court further notes that Plaintiffs'

6/ The Court leaves open the possibility that the environmentally protective objectives of the National Park Service and the procedures followed herein for the implementation thereof may well render the "Assessment" the functional equivalent of an Environmental Impact Statement. See, e.g., State of Maryland v. Train, 415 F.Supp. 116, 121-22 (D.Md. 1976).

claim of a lack of an interdisciplinary approach in the promulgation of the regulations is at least called into question by testimony concerning consultation between Defendants and the U.S. Fish and Wildlife Service. Among the other agencies on record as having contributed comments on the instant regulations are the National Marine Fisheries Service, the Florida Department of National Resources, and the Florida Game and Fresh Water Commission. 45 Fed.Reg. 10351 (1980). Moreover, even if the Court were to find a violation of NEPA, this finding alone would not obviate Plaintiffs' burden of showing that the general requirements for prelimiary injunctive relief have been satisfied. Canal Authority of State of Florida v. Callaway, 489 F.2d at 577, 78.

The Court is not inclined to agree with Plaintiffs that the procedures by which the regulations herein were adopted amount to a denial of due process. Assuming without deciding that Plaintiffs have a legitimate claim of entitlement to their commercial fishing permits, the Court finds that Plaintiffs were afforded sufficient notice and opportunity to be heard to satisfy the constitutional requirements of due process.[7/] Specifically, the procedural safeguards employed in the instant case included: (1) four public workshops throughout South Florida preceding

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7/ Having decided intitially that the regulations herein were not "significant", the Court would find, at least preliminarily, that from the evidence adduced the rulemaking procedures for the development of non-significant rules were substantially followed. 43 C.F.R. § 14.5 (1979).

promulgation of the proposed regulations; (2) four public hearings throughout South Florida following publication of the proposed regulations at 44 Fed.Reg. 53541 (1979); (3) periods of comment on the regulations as proposed and as published in final form at 45 Fed.Reg. 10350 (1980). By their own allegations in the complaint, Plaintiffs admit having participated in these public forums and having contributed comments in connection therewith. Significantly, Defendants solicited this public input in the rulemaking process although not required to do so by the rulemaking provisions of the Administrative Procedure Act, under which matters relating to public property are exempted. 5 U.S.C. § 553(a)(2); see Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250, 1253 (9th Cir. 1979).

Plaintiffs' claim that the regulations violate the Privileges and Immunities Clause of the Constitution and deny substantive due process and equal protection under the Fifth Amendment are similarly unconvincing.[8/] Whereas the Privileges and Immunities Clause, (Article IV, § 2, cl. 1), places a limitation on the power of the States, there is no question that the complete power Congress has over public lands under the Property Clause of the Constitution (Article IV, § 3, cl. 2), necessarily includes the power to regulate and protect the wildlife living there. Kleppe v. New Mexico, 426 U.S. 529,

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8/ Plaintiffs' challenge to the imposition of bag limits as unconstitutionally vague as applied to net fishermen is rendered moot by the amendment of the bag limit regulation to exclude net fishermen of mullet and pompano. See note 2 supra.

540-41, 96 S.Ct. 2285, 2292-93, 49 L.Ed.2d 34 (1976). Accordingly, Defendants are authorized, under 16 U.S.C. § 3, to make rules and regulations for the Park deemed necessary or proper to provide greater resource protection through regulated use, and increase recreational use and enjoyment of park resources by resolving the competition between commercial and recreational fishermen.[9/] Plaintiffs have not clearly demonstrated that the instant regulations are neither rationally nor substantially related to the accomplishment

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9/ Such authority over the use and management over national parks has been held to include the power to prohibit entirely activities inconsistent with the purposes for which the National Parks system was established. See, e.g., United States v. Brown, 552 F.2d 817, 822-23 (8th Cir.), cert. denied, 431 U.S. 949, 97 S.Ct. 2666, 53 L.Ed.2d 266 (1977).

of the foregoing objectives. To be sure, there is ample evidence in the record from which Defendants could reasonably conclude that regulation of park resources among competing user groups was both necessary and appropriate. Moreover, the evidence is undisputed that the sanctuary areas will eliminate entirely potential crocodile encounters with net fishermen and prevent disruption of crocodile nesting areas by boat traffic.[10/] See, e.g.,

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10/ Although Plaintiffs have also attached the regulations herein as "philosophically" unsound, the Court notes that the Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq., imposes an affirmative duty on Defendants not only to protect but also to increase the population of endangered species, such as the American crocodile. Defenders of Wildlife v. Andrus, 428 F.Supp. 167, 169-70 (D.D.C. 1977). Plaintiffs' reliance in this regard on the policy underlying the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1801 et seq., is misplaced. That Act cannot be said to have either expressly or impliedly repealed the high priority accorded the protection of animal life under the Endangered Species Act. Compare Tennessee Valley Authority v. Hill, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978).

Fisherman v. Andrus, 433 F.Supp. 1103 (D.Arizona 1977), aff'd sub nom., Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250 (9th Cir. 1979). Furthermore, inasmuch as the bag limits are imposed upon all hook-and-line fishermen, and the sanctuary areas closed to all public access, Plaintiffs' argument that these regulations are discriminatory and impose invidious or arbitrary classifications is not persuasive. See, e.g., LaBauve v. Louisiana Wildlife and Fisheries Commission, 444 F.Supp. 1370, 1381-85 (E.D.La. 1978).

Contrary to Plaintiffs' contention, the Court finds that Defendants are not estopped to adopt the regulations challenged herein. Where, as in the present case, an agency of the Federal Government acts in a sovereign

capacity for the benefit of the public, the United States is not subject to an estoppel which would impede the exercise of its governmental functions. United States v. State of Florida, 482 F.2d 205 (5th Cir. 1973); Accord, Utah Power & Light Company v. United States, 243 U.S. 389, 37 S.Ct. 387, 61 L.Ed. 791 (1917). Nor does the Court conclude that the facts of the instant case presently before the Court warrant departure from controlling precedent in this Circuit.[11/]

11/ Thus, there is no evidence that the alleged assurances by federal officials as to continued commercial fishing in the Park were tantamount to fraudulent misrepresentations, or were ever incorporated into the written agreement or deed between the United States and the State of Florida by which land was ceded for the creation of Everglades National Park. Compare Peele v. Morton, 396 F.Supp. 584, 586-89 (E.D.N.C. 1975). Parenthetically, the Court notes that over the years and without objection, Defendants have increasingly exercised prescriptive powers in the Park. See note 3 supra.

Plaintiffs have also failed to carry their burden of demonstrating a substantial threat of irreparable injury absent injunctive relief. First, the regulation prohibiting all commercial fishing in park waters as of December 31, 1985, quite obviously poses no imminent harm to Plaintiffs. See, e.g., Peele v. Morton, 396 F.Supp. 584, 589 (E.D.N.C. 1975). Only two of the newly enacted regulations are enforceable immediately: (1) the closure of Little Maderia Bay and Joe Bay; and (2) the bag limit on fish catches, which effectively applies only to commerical hook-and-line fishermen. See note 2 supra. With respect to enforcement of restrictions on where one may fish and how much fish may be caught, the Court cannot conclude on the basis of the isolated and conclusory affi-

davits submitted herein that the alleged harm to Plaintiffs is necessarily irreparable.[12/] It is apparent, for example, that bag limits imposed within the confines of the Park do not deprive commercial hook-and-line fishermen of the right to pursue gainful commercial fishing activity outside Park waters. It is equally apparent, moreover, that the establishment of crocodile sanctuaries does not impede the right of all fishermen to fish the vast unrestricted portions of Park waters. On balance, the Court opines that the threatened injury to Plaintiffs does not outweigh

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12/ That Plaintiffs' injuries would result from threatened prosecution under the instant regulations would not, as Plaintiffs suggest, be sufficient to justify a determination of irreparability. See, e.g., LaBauve v. Louisiana Wildlife and Fisheries Commission, 444 F.Supp. at 1385.

the harm to Defendants and disservice to the public interest that would ensue if enforcement of the National Park Service regulations is enjoined. In balancing the relative hardships threatened to the parties, the Court is guided by the compelling governmental interest in preserving national park resources and enhancing the public use and enjoyment thereof. 16 U.S.C. § 1. In particular, the legislation establishing Everglades National Park provides "The said area or areas shall be permanently reserved as a wilderness, and no development of the project or plan for the entertainment of visitors shall be undertaken which will interfere with the preservation intact of the unique flora and fauna and the essential primitive natural conditions now prevailing in the area." 16 U.S.C.

§ 410(c). To enjoin preliminarily the enforcement of the instant regulations, thereby permitting the continued unrestricted exploitation of the Park's fishery resources, would undermine the aforestated congressional expression of the public interest which Defendants are by law obligated to promote, and Plaintiffs have failed to convince the Court otherwise.13/

The above discussion shall constitute the Court's Findings of Fact and Conclusions of Law pursuant to Fed.R.Civ.P. 52(a). For the foregoing reasons, it is thereupon

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13/ The Court reiterates that whatever rights Plaintiffs might arguably possess by virtue of their commercial fishing permits, e.g., LaBauve v. Louisiana Wildlife and Fisheries Commission, 444 F.Supp. at 1377-79, such rights are not unfettered or absolute, and the precise extent to which restrictions may be placed thereon remains for consideration at a full hearing on the merits.

ORDERED AND ADJUDGED that Plaintiffs' Motion for Preliminary Injunction be and the same is hereby DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 29 day of April, 1980.

/s/ Sidney M. Aronovitz
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Paul & Thomson
Atlee W. Wampler, III, U.S. Attorney
(AUSA Richard A. Marshall, Jr.)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5722

D.C. Docket No. 80-789

ORGANIZED FISHERMEN OF FLORIDA, HERBERT Z. MARVIN, VICTOR H. MARKLEY and CLYDE R.RAFFIELD,

Plaintiffs-Appellants,

versus

DONALD P. HODEL, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, RUSSELL DICKENSEN, DIRECTOR OF NATIONAL PARK SERVICE, BOB BAKER, REGIONAL DIRECTOR OF THE SOUTHEAST REGIONAL OFFICE OF THE NATIONAL PARK SERVICE and JOHN MOREHEAD, SUPERINTENDENT OF EVERGLADES NATIONAL PARK, U.S. DEPARTMENT OF THE INTERIOR, THE NATIONAL PARK SERVICE, and EVERGLADES NATIONAL PARK,

Defendants-Appellees,

EVERGLADES PROTECTION ASSOCIATION, INC., and WORLD WIDE SPORTSMEN, INC.,

Intervenors.

Appeal from the United States District Court for the Southern District of

BEFORE: HILL, ANDERSON and GARZA*, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees and intervenors, the costs on appeal to be taxed by the Clerk of this Court.

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* Honorable Reynaldo G. Garza, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Entered: November 15, 1985
For the Court: Spencer D. Mercer,
Clerk

By: /s/ [ILLEGIBLE]
Deputy Clerk

ISSUED AS MANDATE: January 6, 1986

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5722

ORGANIZED FISHERMEN OF FLORIDA, HERBERT Z. MARVIN, VICTOR H. MARKLEY, and CLYDE R. RAFFIELD,

Plaintiffs-Appellants,

versus

DONALD P. HODEL, Sec. U.S. Dept. of Interior, RUSSELL DICKENSEN, Dir. Nat'l. Park Ser., BOB BAKER, Reg. Dir. SE Reg. Off. of Nat'l. Park Ser., JOHN MOREHEAD, Super. of Everglades Nat'l. Park, U.S. DEPT. OF THE INTERIOR, THE NATIONAL PARK SERVICE, and EVERGLADES NAT'L PARK,

Defendants-Appellees,

EVERGLADES PROTECTION ASSOCIATION, INC., & WORLD WIDE SPORTSMEN, INC.,

Intervenors.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING

(December 23, 1985)

BEFORE: HILL, ANDERSON and GARZA*, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellants ORGANIZED FISHERMEN OF FLORIDA, HERBERT Z. MARVIN, VICTOR H. MARKLEY, and CLYDE R. RAFFIELD is DENIED.

ENTERED FOR THE COURT:

/s/ R. LANIER ANDERSON, III
United States Circuit Judge

*Honorable Reynaldo G. Garza, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX F

AMENDMENT V -- CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

APPENDIX G

Section 3, Clause 2. Public Lands

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

U.S. Const. art. IV, § 3, cl. 2.

APPENDIX H-1

§ 410. Establishment; acquisition of land

When title to all the lands within boundaries to be determined by the Secretary of the Interior within the area of approximately two thousand square miles in the region of the Everglades of Dade, Monroe, and Collier Counties, in the State of Florida, recommended by said Secretary, in his report to Congress of December 3, 1930, pursuant to the Act of March 1, 1929 (45 Stat. 1443), shall have been vested in the United States, said lands shall be, and are, established, dedicated, and set apart as a public park for the benefit and enjoyment of the people and shall be known as the Everglades National Park: Provided, That the United States shall not purchase by appropriation of public

moneys any land within the aforesaid area, but such lands shall be secured by the United States only by public or private donation.

Everglades National Park Act (1934), ch. 371, § 1, 48 Stat. 816, codified in 16 U.S.C. § 410 (1982)).

APPENDIX H-2

§ 410c. Preservation of primitive condition

The said area or areas shall be permanently reserved as a wilderness, and no development of the project or plan for the entertainment of visitors shall be undertaken which will interfere with the preservation intact of the unique flora and fauna and the essential primitive natural conditions now prevailing in this area.

Act of May 30, 1934, ch. 371, § 4, 48 Stat. 817, codified in 16 U.S.C. § 410(c) (1982).

APPENDIX I

NATIONAL PARK SERVICE

§ 1. Service created; director; other employees

There is created in the Department of the Interior a service to be called the National Park Service, which shall be under tne charge of a director. The Secretary of the Interior shall appoint the director, and there shall also be in said service such subordinate officers, clerks, and employees as may be appropriated for by Congress. The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, except such as are under the jurisdiction of the Secretary of the Army, as provided by law, by such means and measures

as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

National Park Service Act, ch. 408, § 1, 39 Stat. 535 (1916), codified, as amended, in 16 U.S.C. § 1 (1982).

APPENDIX J-1

Section 23. OWNERSHIP OF GAME, FRESH-WATER FISH, NON-GAME BIRDS AND FUR-BEARING ANIMALS VESTED IN THE STATE. -- All fish in the rivers, creeks canals, lakes and other fresh waters within the jurisdiction of the State of Florida, are hereby declared to be and shall continue to be the property of the State of Florida, excluding all privately owned enclosed fish ponds, not to exceed one hundred fifty acres (150 acres) in area, and subject to the restrictions imposed by this Act or otherwise. No land owned by the State of Florida shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon, except as provided in this section. All non-migratory birds and all game animals and

fur-bearing animals within the jurisdiction of the State of Florida are hereby declared to be and shall continue and remain the property of the State, and the State hereby assumes, consistent with the laws of the United States, the conservation and protection of all migratory birds.

§ 23, Ch. 13644, Laws of Fla. (1929).

APPENDIX J-2

370.10 Crustacea, Marine Animals, fish, regulations, general provisions. -

(1) OWNERSHIP OF FISH, SPONGES, ETC.- All fish, shellfish, sponges, oysters, clams, and crustacea found within the river, creeks, canals, lakes, bayous, lagoons, bays, sounds, inlets, and other bodies of water within the jurisdiction of the state, and within the Gulf of Mexico and the Atlantic Ocean within the jurisdiction of the state, excluding all privately owned enclosed fishponds not exceeding 150 acres, are the property of the state and may be taken and used by its citizens and persons not citizens, subject to the reservations and restrictions imposed by these statutes. No water bottoms owned by the state shall ever be sold, transferred, dedicated, or

otherwise conveyed without reserving in the people the absolute right to fish thereon, except as otherwise provided in these statutes.

Fla. Stat. § 370.10(1) (1985).

APPENDIX K

§ 7.45 EVERGLADES NATIONAL PARK.

(e) Definitions. (1) The term "cast net" means a type of circular falling net, weighted on its periphery, which is thrown and is retrieved by hand.

(2) The term "spiny lobster" (crawfish) means invertebrates of the genus Panulirus.

(3) The term "dipnet" means a device for obtaining bait, the netting of which is fastened in a frame.

(4) The term "mullet" means a member of the family Mugilidae.

(5) The term "minnow" means a fish used for bait from the family Cyprinodontidae, Poeciliidae, or Atherinidae.

(6) The term "ornamental tropical fish" means finfish not commonly used

for food or bait, belonging to the families Syngathidae, Apogonidae, Pomacentridae, Scaridae, Blennidae, Calliony-midae, Gobiidae, Ostraciidae and Diodontidae.

(7) The term "pilchard" means a member of the herring family (Clupeidae), generally used for bait.

(8) The term "pinfish" means a member of the genus Lagodon (family: Sparidae).

(9) The term "shrimp" means a member of the invertebrate family Penaeidae.

(10) The term "mojarra" or "goats" means a member of the family Gerreidae.

(11) The term "ballyhoo" means a member of the genus Hemiramphus (family: Exocoetidae).

(12) The term "commercial fisherman" means a person, firm or corporation engaged in the harvesting or fishing of an edible sea product for sale or barter.

(13) The term "guide fisherman" means a person or group of persons who provide a service to visitors of the park for the purpose of fishing or interpretation of the natural resources.

(f) Fishing. Except as provided in these regulations, or in § 2.3 of Title 36 of the Code of Federal Regulations, all fishing shall be done in accordance with the laws of the State of Florida, including license requirements; and such nonconflicting State laws are hereby adopted and made a part hereof by reference.

(1) A person, firm, or corporation engaged in commercial fishing, commercial harvesting, or guide fishing for an edible sea product in the waters of the park open for this purpose must possess an annual nonfee commercial fishing permit issued by the Superintendent.

(2) Seahorses, starfish, spiny lobster, ornamental tropical fish, nonfood fish as defined by the laws of the State of Florida, and mollusks other than oysters shall not be taken from park waters for any purpose.

(3) The taking of oysters from the waters of the park is prohibited, except by hand or rake for personal use.

(4) Recreational crabbing (stone or blue) may be conducted using attended gear only and no more than five (5) traps per person. Buoyed traps and other unattended gear are prohibited.

(5) Crabs (stone and blue) may be taken from park waters by commercial fishermen as provided for in Florida statutes 370.13, 370.132 and 370.135 and subject to the following restrictions:

(i) A person, firm, or corporation must possess a valid commercial fishing permit as provided for in paragraph (f)(1) of this section and shall not operate more than a total of 400 traps.

(ii) All traps shall be made of wood and be buoyed as provided for in Florida statute 370.13.

(iii) Traps may be used only in those park waters hereinafter described; Provided, however, that such traps may not be placed closer than 200 feet from any key or marked waterway:

Blackwater Sound and Buttonwood Sound; that portion of Florida Bay south

of a line drawn from the southern tip of Boggy Key to the northern tip of Whale-back Key, then to the southeastern tips of Low Key, Stake Key and, Manatee Key, then westerly to a small unnamed key north of Jimmies Channel, then south following shoal waters to Captains Key, thence westerly following shoal waters touching a series of unnamed keys to Panhandle Key, thence to the northern tips of Spy Key, Sid Key, Cluett Key, Man-of-War Key, thence to the southern tip of Sandy Key, thence to the Intra-coastal Waterway Marker No. 2 south of East Cape Sable; and the area south and west of a line connecting said marker to points one-quarter mile offshore from East Cape, Middle Cape, Northwest Cape, Shark Light, Shark Point, Highland Point, Porpoise Point, Seminole Point,

Mormon Key, Pavillion Key, Rabbit Key, Indian Key Light and to the park boundary corner at approximately 25°50'N. latitude, 81°30'W. longitude.

(6) Live bait (shrimp, minnows, pilchards, pinfish, mullet, mojarras or ballyhoo) may be taken by fishermen with hook and line, dipnet (not exceeding 3 feet at its widest point), or by cast net (not exceeding 12 feet in diameter). No live bait shall be taken by fishermen for the purpose of sale. Dipnets and cast nets may not be dragged or trawled.

(7) Gill nets shall not exceed singly or in combination 1,200 yds. in length and shall have a stretch mesh of not less than 2 1/2 in. from knot to knot after being shrunk. Twine used shall not exceed No. 208 nylon or monofilament. Only one lead line and one

cork line shall be permitted, and neither lead nor cork lines shall be more than five-sixteenths of an inch in diameter. No purse, pocket or other special device for entrapping or catching fish shall be used on a gill net except as provided for in paragraph (f)(9) of this section. Gill nets may be gathered or taken in by hand only and shall not be dragged. Nets shall not be pulled up on shore. Gill nets may be tied together and used in groups of not more than three: Provided, that the nearest net or groups of nets shall be at least 500 yards from any other gill net. When used at night, such nets shall be marked with lighted buoys.

(8) Trammels shall have a stretch mesh of not less than 12 inches (on gill nets of not less than 3 1/4 inches

stretch mesh). Trammel nets shall not exceed 1,200 yards in length used singly or in combination. Trammel nets shall not be dragged. The nearest set or groups of sets shall be at least 200 yards from any other net. When used at night, such nets shall be marked with lighted buoys. Trammel nets shall not be used within the Florida Bay area of the park.

(9) Except as provided in this section, no nets, seines, traps, spears, explosives, or other devices for the trapping, catching, killing, or taking of fish, bait, or other edible product of the sea, except hook and line, may be placed, used or possessed by any person, firm, or corporation within the park.

(10) No person, firm, or corporation engaged in commercial fishing shall

leave any net, trap, or other device used for taking products of the sea unattended for more than fourteen (14) days.

(11) The following described areas are closed to all fishing:

(i) All waters of T. 58 S., R. 37 E., sections 10 through 15, inclusive, measured from Tallahassee meridian and base, in the vicinity of Royal Palm Visitor Center, except Donut Lake and Pine Island Lake.

(ii) All waters in T. 54 S., R. 36 E., sections 19, 30, and 31, and in T. 55 S., R. 36 E., sections 6, 7, 18, 19, and 30, measured from Tallahassee meridian and base, in the vicinity of Shark Valley Loop Road from Tamiami Trail south.

(12) The following described areas are closed to all commercial fishing and

to the taking of products of the sea by nets or traps for any purpose:

(i) All inland bays, bights, canals, lakes, rivers, and other bodies of water lying inland from the shores of Florida Bay, and in addition, the area north of a line drawn from Christian Point to Shark Point to Mosquito Point, including Otter Key, thence to Crocodile Point to Terrapin Point and Madeira Point.

(ii) All inland bays, lakes, canals, rivers, and other bodies of water lying inland from the nearest recognizable mainland shoreline from Flamingo to East Cape Sable and north to and including Lostman's River. For the purpose of this paragraph, the mainland shorelines shall be considered to be that area where the gulf coast rivers flow into the Gulf of Mexico.

(iii) From Lostman's River north to the park boundary corner at approximately 25° 50' N. latitude, 81° 30' W. longitude, the following inland waters: Gopher Key Creek from its junction with Cannon Bay southwestward through Charlie Creek to the Gulf of Mexico, all waters in the Gopher Key Creek drainage basin, and all waters from the north end of Alligator Creek to Onion Key.

(13) West Lake Pond, Coot Bay Pond, and other small ponds bordering the park road shall be closed to fishing and the harvesting of any edible product of the sea during those periods, as determined by the Superintendent, that such action is necessary to protect feeding and roosting birds. Notice of closing shall be given by the posting of appropriate signs at these locations.

(14) Possession of a gill net, trammel net, crab trap, or other commercial fishing equipment while in closed waters is prohibited; except that during an emergency or in times of inclement weather, boats with such equipment may anchor behind outside islands or in the mouths of rivers only. The equipment may not be used or taken from the boat during this time and when the emergency or inclement weather has passed, boats with such equipment aboard shall be removed from such closed waters.

(15) Nets, gear and fish, and other edible products of the sea that are legally possessed in State waters but are illegally possessed in park waters may be transported through the park only over Indian Key Pass, Sand Fly Pass, Rabbit Key Pass, Chokoloskee Pass and a

passageway northwestward by the most direct route across Chokoloskee Bay to Fakahatchee Bay. Boats traveling through these passageways with such nets, gear, fish, or other edible products of the sea shall remain in transit unless disabled.

(16) Fish may not be fileted while in or on Park waters, except for four (4) filets per person for immediate consumption.

(17) Bag limits: No person shall take, have in his possession, buy, offer for sale, sell, or unnecessarily destroy, at any time more than: Ten (10) fish of one species, excluding bait fish, as stated in paragraph (f)(6) of this section, and not totally more than twenty (20) fish of all species, excluding bait fish, with the exception of

persons, firms, or corporations holding a valid commercial park fishing permit for mullet and pompano netting only.

(g) Boating. (1) West Lake Pond and West Lake shall be closed to all vessels during those periods, determined by the superintendent, that these areas are being used by feeding birds. At all other times, these areas, including Little Sable Creek, shall be open only to hand-propelled vessels or Class A motorboats powered by motors not to exceed 5 1/2 horsepower that can be launched by hand. Notice of closing will be given by the posting of appropriate signs at these areas.

(2) Except to effect a rescue, or unless otherwise officially authorized, no person shall land on keys of Florida Bay except those marked by signs denot-

ing the area open, nor on the mainland shorelines from Terrapin Point eastward to U.S. Highway 1, including the shores of all inland bays and waters and those shorelines contiguous with Long Sound, Little Blackwater Sound, and Blackwater Sound.

(3) Motorboats are prohibited in the following inland fresh water areas: Long Pine Key Lake, Pine Glade Lake, Sisal Pond, Big Ficus Pond, Sweetbay Pond, Paurotis Pond, Nine Mile Pond, Royal Palm Pond, Pine Island Pond, Parachute Key Ponds, Coot Bay Pond, Mrazek Pond, and L67 canal.

(4) The following described areas are closed to all public entry: Little Madeira Bay, Taylor River, East Creek, Mud Creek, Davis Creek, Joe Bay and its easternmost portion, commonly called

Snag Bay, and all creeks inland from the northern shoreline of Long Sound to U.S. Highway 1.

(5) Vessels used as living quarters shall not remain in or be operated in the waters of the Park for more than 14 days without a permit issued by the Superintendent. Said permit will prescribe anchorage location, length of stay, sanitary requirements and such other conditions as considered necessary.

(6) The following area bordering the Shark Valley Loop Road from Tamiami Trail south is closed to all boating: Sections 19, 30, and 31, Township 54 South, Range 36 East; sections 6, 7, 18, 19, and 30, Township 55 South, Range 36 East.

(h) Prohibition of Commercial Fishing. (1) As of December 31, 1985, all commercial fishing will be prohibited in waters of the Park. When this provision becomes effective, the following regulations will no longer be in effect: f(5), (7), (8), (10), and (14).

35 C.F.R. § 7.45(e)-(h) (1985).

APPENDIX L

Title 36 -- Parks, Forests, and Memorials

CHAPTER 1 -- NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR

PART 7 -- SPECIAL REGULATIONS, AREAS OF THE NATIONAL PARK SYSTEM

Everglades National Park, Fla.; Fishing

A proposal was published at page 8585 of the FEDERAL REGISTER of May 8, 1971, to amend paragraph (g) of § 7.45 of title 36 of the Code of Federal Regulations. The effect of the amendment is to bring current enforcement and regulation into conformity.

Interested persons were given 30 days for submitting written comments, suggestions, or objections with respect to the proposed amendment. There were no responses.

Since it is the policy of the Department of the Interior, whenever

practicable, to afford the public an opportunity to participate in the rule-making process, a public hearing was held to receive comments, suggestions, or objections with respect to the proposed amendment on December 5, 1972, at Homestead, Fla. Comments received as a result of this public hearing fall into three general categories: Suggestions to expand the existing fisheries; proposals for a study of the fisheries in the park and preparation of an environmental impact statement pursuant to the National Environmental Policy Act of 1969 (Public Law 91-190, 83 Stat. 853); and objections to expansion of the existing fisheries.

The major requests for expansion of the existing fisheries are for: The introduction of a commercial spiny

lobster trap fishery; an increase in the number of navigable passageways available for transportation of commercial fishing equipment not allowed in park waters; the taking of female, in addition to male, blue crabs; the field removal of stone crab claws; and an effective lengthening of the stone crab season. These suggestions have been rejected since they are inconsistent with National Park Service management policy for natural areas and the purpose for which Everglades National Park was established, as stated in the enabling legislation (48 Stat. 816), or would produce administratively unmanageable conditions that could preclude management of the fisheries on a sustained yield basis.

The suggestions for additional study of the fisheries of the park have

been accepted, and investigations are currently in progress.

Prior to establishment of Everglades National Park, the Federal Government made several commitments to local interests. As early as 1936, the National Park Service promised that existing fisheries within the park would be continued on a sustained yield basis and in accordance with, or in close conformity to, the laws of the State of Florida. This constitutes the basis of fisheries management in Everglades National Park. With this commitment in mind, fishing regulations were written and promulgated in 1951 which remained in effect until 1965. At that time, the regulations were revised to reflect the park boundary expansion effected in 1958 and to further limit commercial fishing

activities. Before the new regulations were ever enforced, local interests objected to some aspects of the revisions, claiming that the new regulations did not conform with the laws of the State of Florida. Meetings with these individuals were held and compromises were reached. An administrative revision was then issued and enforced as an interim solution until formed changes could be effected. The regulations as published in 1965, and modified by administrative memorandum in 1966, presently serve as the special regulations governing fishing in Everglades National Park. Since adoption of the proposed regulations will result in no actual change in management of the fishery resources, this action is not a major Federal action significantly

affecting the quality of the environment, and, therefore, proposals for the preparation of an environmental impact statement have been rejected.

Suggestions to completely eliminate the existing commercial fishery have been rejected as being inconsistent with prior commitments by the Federal Government to accommodate both commercial and sport fisheries in Everglades National Park on a sustained yield basis. Two additional suggestions for limitation of the commercial fishery have been adopted: The minimum allowable harvest size of stone crab claws in paragraph (g)(6)(vii) was increased from 4 to 4 1/4 inches in overall length to conform with the laws of the State of Florida, and nets will not be permitted in the Florida Bay area of the park

since this area has never been subject to trammel net fishing and their use there would constitute an unacceptable expansion of this fishery.

This amendment will become effective on July 26, 1973.

(5 U.S.C. 553; 39 Stat. 535; 16 U.S.C. 3; 43 Stat. 1443; 48 Stat. 816; 16 U.S.C., sec. 410; 72 Stat. 280.)

38 Fed.Reg. 16,778 (1973).